UNION OF SOUTH AFRICA.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(TRANSVAAL AND NATAL)

1933.

345.1-055

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CASE NO. 1.

JOHANNES MTUNZI VS. JOSEPHINA TSHABALALA.

DURBAN. 10th January, 1933. Before H.C. Lugg, Esq., President, Native Divorce Court.

Marriage by Christian rites - Law 46,1887(N) - Extra territorial Natives - Necessity for licence - Law 14, 1888(N) - "Natives of this Colony."

NO NATIVE FALLING WITHIN THE DEFINITION OF SECTION 1 OF LAW 14, 1888, AND NOT EXEMPTED FROM THE OPERATION OF NATIVE LAW, MAY CONTRACT A CHRISTIAN MARRIAGE IN NATAL IN ANY CIRCUMSTANCES UNLESS A LICENCE UNDER LAW 46, 1887, IS FIRST HAD AND OBTAINED.

The parties are Natives subject to Native law and have been resident in Durban for a number of years. Plaintiff originally came from the Transvaal and Defendant from the Orange Free State where they are still respectively domiciled.

They state that in 1929 they applied to the Magistrate, Durban, for a licence to be married by Christian rites in accordance with Law 46, 1887, but were informed that as they were not domiciled in Natal a licence could not be issued to them but that they were at liberty to approach a Native Minister to be married in the ordinary way. Acting on this advice they went to the Rev. Msimang, a Native Minister of Durban (since deceased) and after publication of banns were married by him on the 15th October of that year.

The parties have since fallen out, and Plaintiff seeks to have the union annulled on the grounds that the marriage was null and void because of not having been solemnized under cover of a licence as required by Section 7 of Law 46, 1887.

Law 46, 1887, as shown by the preamble, was enacted for the express purpose of regulating the marriage of Natives by Christian rites in Natal, and provides for the observance of certain formalities which must be complied with by the parties before they can be married.

Section 1 provides amongst other things, that "on and after the coming into force of this Law, it shall and may be lawful for any of the Natives of this Colony who may be desirous of being joined together in matrimony by Christian rites to be married under the provisions of Ordinance No. 17, 1846, entitled 'Ordinance to amend the Law regulating marriages within the District of Natal', subject, however, to the special provisions thereinafter set forth, etc.", whilst Section 2 enacts that any Natives desirous of being so married shall apply to the Magistrate of the Division or county in which they or the intended bride reside for a licence, and be required to furnish and declare to the correctness of certain particulars to be set out in schedule A of the law, before such licence can be granted.

Section 5 provides that the consent of the father or guardian must also be obtained before the issue of a licence, and where from certain causes such consent cannot be obtained, the parties may petition the Governor.

Section.....

Section 7 provides that it shall not be competent or lawful for any Natives, one or both of whom may be subject to native law, to be married by Christian rites unless the licence is first had and obtained, and Section 8 declares that it shall not be competent or lawful for any Minister of the Christian religion to solemnize matrimony between such Natives except upon the production of the licence.

In view of the words "Natives of this Colony" occurring in Section 1 of the Ordinance, the question naturally arises as to whether this law applies to Natives domiciled elsewhere than in Natal, but a definite answer is to be found in Section 1 of Law 14, 1888, which provides that whenever the words "Native" or "Natives of this Colony" are used in any law they shall be taken to include and to have included any member of the aboriginal races of Africa south of the Equator, and as the parties fall within this definition it follows that they must be subject to the provisions of Law 46, 1887.

As the tenor of the enactment, especially Sections 7 and 8 of this Law, are peremptory in character and render marriages unlawful unless contracted under the authority of a licence, I must hold, although somewhat reluctantly, that the union entered into by the parties was null and void. It follows that no Native falling within the definition of Section 1 of Law 14, 1888, and not exempted from the operation of native law, may contract a Christian marriage in Natal in any circumstances unless a licence under Law 46, 1887, is first had and obtained.

Nor to my mind can the irregularity be cured by Act 20, 1913. This Act, as the title reads, was passed in order "to amend the law in force in the several Provinces of the Union relating to Marriage by Banns and to provide that erroneous interpretation of or accidental default in complying with the law relating to the publication of banns shall not invalidate marriages otherwise validly solemnized before or after the commencement of this Act."

Law 46, 1887, is not a law relating to marriage by banns but an enactment passed for the express purpose (subject to certain conditions) of enabling Natives to contract Christian marriages under the ordinance of 1846; but nowhere are banns referred to. Consequently their publication as an antecedent requisite to a marriage are not necessary although this is often done.

As the parties were not licensed under Section 2 it was not permissible for them to contract a marriage under Ordinance 17, 1846, so that they were not married under any recognised law at all.

This decision will, without doubt, affect the validity of quite a number of unions contracted in similar circumstances in Natal, but it should be possible for the parties to rectify matters by either applying for a licence where they are in a position to comply with Section 2 for the solemnization of the union under its authority, or failing this, by contracting a marriage in their Province or domicile.

CASE NO. 2.

MNYIKITWA NGEMA V/S. BENJAMIN NGEMA.

DURBAN. 16th January, 1933. Before H.C. Lugg, Esq., President, Messrs. F.H.C. Behrmann and C.S. Williams, Members of Court.

Inheritance and Succession - Commoner, Zululand - Right to appoint chief wife - Guardianship - Rule 24, Native Commissioner's Court - Curator ad litem.

WITH COMMONERS THE FIRST WIFE TAKEN IN MARRIAGE IS THE RECOGNISED CHIEF WIFE, BUT IN ZULULAND, AS DISTINGUISHED FROM NATAL, COMMONERS ENJOYED THE RIGHT TO APPOINT A CHIEF WIFE UNTIL THE NEW CODE CAME INTO OPERATION ON THE 1st NOVEMBER, 1932.

The late Zibezwile Ngema, who died in 1926, had three wives and was a commoner.

Respondent is the eldest son of the first wife and Appellant the only son of the third wife.

Six sons were born to the first wife, three daughters to the second wife and four daughters and Appellant to the third.

Respondent claimed a beast or its value £5 to replace an animal paid as damages on the seduction of a daughter born to the second wife and alleged to have been slaughtered by Appellant's guardian Nkasa, and eleven head of lobolo cattle received by Appellant on the same woman but to which he as general heir, also laid claim. It will thus be observed that the one claim is against the guardian personally and the other against Appellant and that the latter involves a dispute over the heirship to the estate of late Zibezwile.

Appellant is still a child but is represented by his paternal cousin the said Nkasa. Nkasa denied having slaughtered the ox and the second claim was resisted on the grounds that Appellant's mother had been elevated to the position of chief wife at the time of her marriage, thereby inheriting all the property attaching to the second house owing to the absence of male issue therein.

With commoners the first wife taken in marriage is the recognised chief wife, but in Zululand, as distinguished from Natal, commoners enjoyed the right to appoint a chief wife until the new Code came into operation on the 1st November last. Under the old Code of 1878 (sec. 22), which was in force in Zululand until repealed by the Native Administration Act on the 1st January, 1929, the first wife was presumed to be the chief wife. Consequently the onus was on Appellant to show that this special status had been conferred upon his mother. It follows that in order to decide the dispute it becomes necessary to ascertain and determine the heirship to Zibezwile's estate.

At the conclusion of Respondent's evidence the Commissioner held that the onus was upon Appellant (Defendant) to establish his contention.

The evidence adduced in support of Appellant was that given by his own mother and the widow of the second house, deceased's half-brother Bangani, Njikiza, whose relationship to

the parties has not been disclosed, and an uncle named Zazini.

The first three declare that they were present when the appointment was made and that it took place shortly after the wedding of Appellant's mother, but these witnesses appear to have been very much confused as to the time of its occurrence, the dates varying from 1888 when Dinizulu was under detention at St. Helena, to the time of his death in 1921, a period of thirty-three years.

Zazini's evidence is that deceased told him that he had made the appointment on his return from work in Johannesburg, but Nkasa who appears to have been closely associated with Appellant's kraal affairs ever since the kraal broke up after Zibezwile's death in 1926, and who lived quite near him, is only able to say that he heard the latter had made the appointment but had no personal knowledge of the fact. Being a near neighbour and having since assisted in establishing a new kraal for the second and third widows, he should be in a position to throw some light on the matter and explain why Zibezwile kept silent after having taken the important and somewhat unusual step of appointing his third wife as chief wife when he already had six sons to his first wife. The only reason so far advanced for this appointment is that it was made merely out of choice for the third wife.

The Commissioner came to the conclusion that Appellant had failed to discharge the onus placed upon him, and without requiring Respondent to call his witnesses, awarded the latter a judgment for the full amount claimed and costs. He also added that he found Respondent to be the general heir.

In arriving at this decision the Commissioner commented upon the disparity in the evidence given by the defence witnesses in respect of the time of Appellant's marriage; to the improbability of a disposition which would have led to Appellant as the only son of the third wife benefitting to the extent of four sisters of his own house, and three of the second, whilst the six sons of the first wife receive nothing at all; and to the fact that Appellant or his representative took no part at the funeral of the late Zibezwile. The excuse has been advanced that Appellant was too young, but this cannot be accepted as he could have been represented by his mother or some other suitable person.

The Native Commissioner completely discounted the evidence submitted in support of Appellant's case and we are in complete accord with his views.

Mr. Darby has argued that as Respondent is really Appellant's legal guardian by virtue of being the eldest son in his late father's kraal, he should have taken steps to appoint a curator ad litem before instituting the action against the ward, and not to have allowed the choice to fall by fortuitous circumstances on Nkasa as Appellant was too young and quite incapable of selecting a suitable person himself. He considers that Appellant has been prejudiced in his defence, and instances the fact that when Nkasa was asked whether he had any questions to put to the Respondent at the conclusion of his evidence in chief he said he was not prepared to say anything unless his own father Lokotwayo was present.

In answer to this contention we can but draw attention to rule 24 of the rules in the Courts of Native Commissioner and to the fact that Nkasa has closely associated himself with Appellant's affairs since his father's death, assisted in building the kraal and slaughtered the beast claimed under claim 1 - facts which would make him a suitable person for the position.

It is not the custom for wards to select their own guardians and as no exception was taken to Appellant being represented by Nkasa at the time, we must assume that the matter was in order.

There would also be serious objection to the selection of a curator ad litem by the legal guardian in these circumstances.

Mr. Darby has also expressed doubts as to whether the girl on whom this lobolo has been received is actually married, but in view of his client's admission that she is married, we must accept this position as being correct.

Turning now to the dispute over the ox, it is clear that this animal was paid for the girl's seduction, and was slaughtered and used for the benefit of her mother's house; but Respondent alleges that Nkasa slaughtered it during his (Respondent's) absence in Johannesburg. The latter denies it and avers that it was killed by the woman herself and so far there is only the one man's word against the other. On his return Respondent endeavoured to institute proceedings against Nkasa (presumably for damages) before Chief Solomon Ka Dinizulu but the latter refused to enquire into the matter apparently because Respondent had been ordered by him to leave his ward on allegations of witchcraft.

It seems evident, however, that this item is one for damages against Nkasa personally and one which should not have been included in the present claim. This being so it becomes necessary for us to amend the Native Commissioner's judgment by disallowing this item. This naturally raises the question whether Appellant should get his costs seeing that he has partially succeeded on appeal. In considering this point we find that but for the attitude taken up by Appellant's mother, supported by the widow of the second house and Nkasa in putting forward a preposterous claim, these proceedings would never have been instituted; and although Appellant has been successful in one item, he has failed on the main issue and in the circumstances we are not prepared to allow him costs. There will be no order as to costs of this appeal.

The Native Commissioner has also included in his judgment: "The Court finds that Plaintiff is the general heir to Zibezwile's estate", but as no such declaration was claimed in the summons these words will be struck out.

The order of the Court will therefore be that the appeal be and the same is hereby sustained in part and the judgment of the lower Court amended to read. "For Plaintiff for eleven head of cattle and costs."

There will be no order as to the costs of this appeal.

CASE NO. 3.

FRANS MATHUPA VS. JOSEPH MAHUPYE.

PRETORIA. 15th March, 1933. Before H.C. Lugg, Esq., President, Messrs. J.W. Ord and C.J.N. Lever, Members of Native Appeal Court (Transvaal and Natal Divisions).

Customary union - Dissolution - Return of lobolo - Accusation of witchcraft.

Appeal from the Court of Assistant Native Commissioner, Bochem.

UNTIL DESERTION BY A WIFE IS ESTABLISHED, A CUSTOMARY UNION MUST BE REGARDED AS STILL SUBSISTING AND A CLAIM BY THE HUSBAND FOR RECOVERY OF LOBOLO IS PREMATURE.

This is an appeal from the decision of the Native Commissioner, Bochem.

Appallant married Respondent's cousin by native custom and has had two children by her. He now seeks to recover the lobolo paid on his wife and the custody of the two children on the grounds of her desertion, and instituted the action against Respondent with whom she is now living.

The Commissioner disallowed the claim, finding that the desertion had not been proved and that the cattle had not been received by Respondent but by Appellant's mother-in-law, Matou Mahupye. This woman is dead but is stated to have been succeeded by her daughter and heiress Maphuti who is now in possession of the cattle and is living with Appellant.

It is therefore somewhat difficult to understand why Appellant should be suing Respondent except that he avers that the latter received the lobolo and is now allowing Appellant's wife to live with him at his kraal. Whether Respondent is the woman's recognised guardian or what exactly is the fiduciary relationship between him and Appellant's wife has not been shown, nor is it by any means clear how the mother-in-law came to receive the lobolo on her daughter, or how she was succeeded by a daughter as heiress. This is not in accordance with recognised native law but it may be purely a local custom. No evidence has been led on the point.

It is assumed that Appellant seeks to recover the lobolo because of his wife's desertion which, in accordance with pure native law, would be regarded as dissolving the marriage, but as the Commissioner has been unable to find desertion proved, and until this is established, the marriage must be regarded as still subsisting. Consequently any claim for the recovery of lobolo is premature. (Joel Nodongwe vs. Harry Kanise (1927 Tk. N.A.C. P.-H. M.31., Blaine, p. 22.).

Respondent denies having received the lobolo cattle and has tendered a good deal of evidence to show that it was delivered to the mother-in-law.

The wife states she left her husband because he drove her out of the kraal and accused her of witchcraft. She is,

however, willing to return to him provided he builds her a hut, but he on the other hand states he does not wish to have her back. There would appear to be good grounds for accepting the woman's story, but unfortunately Appellant was not given an opportunity of admitting or denying these allegations.

Accusations of witchcraft, if persisted in, afford grounds for the dissolution of a customary union at the suit of a wife, and if established would disentitle a husband from recovering the lobolo he paid on her.

In the circumstances the appeal will be sustained with costs and the judgment of the Commissioner altered to one absolving Defendant from the instance with costs.

CASE NO. 4.

SARAH MVAKALI VS. JIM NGWENYA.

PRETORIA. 16th March, 1933. Before C.H. Lugg, Esq., President, Messrs. J.W. Ord and C.J.N. Lever, Members of the Native Appeal Court (Transvaal and Natal Division).

Insufficient tender - Costs from date thereof.

An appeal from the Court of Native Commissioner, Piet Retief.

WHEN, IN A CASE FOR DISSOLUTION OF A CUSTOMARY UNION, DEFENDANT AGREED TO THE DISSOLUTION ON CONDITION THAT HE WAS GIVEN IMMEDIATE CUSTODY OF THE CHILDREN AND REFUND OF LOBOLO AND JUDGMENT WAS SUBSEQUENTLY GIVEN ALLOWING PLAINTIFF CUSTODY OF CHILDREN UNTIL SEVEN YEARS OF AGE AND DECLARING DEFENDANT TO HAVE FORFEITED LOBOLO PAID, PLAINTIFF IS ENTITLED TO FULL COSTS OF SUIT.

The parties are Natives resident in the District of Piet Retief. Appellant sued her husband for the dissolution of their customary union on the grounds of cruelty and illtreatment, for the custody of two children born to the marriage, and for the forfeiture of the lobolo paid on her.

Respondent whilst admitting some of the charges made against him and denying others, made an offer at the opening of the proceedings and before any evidence had been led agreeing to the dissolution of the union on condition that he was allowed to have the immediate custody of the children and was refunded the lobolo, less two to be deducted in respect of the two children born to them. The case was then adjourned for ten days to enable the parties to come to some settlement. This apparently proved abortive because on resumption the case proceeded to final issue without further reference being made to the matter.

The Commissioner gave judgment in Appellant's favour in the following terms:-

"Judgment for Plaintiff for a dissolution of the

customary.....

customary union with costs to date of 'tender'. The custody of the two minor children of the marriage is given to Defendant but Plaintiff is allowed to retain possession of them until they attain the age of seven years when they are to be returned to the custody of Defendant. Defendant to have reasonable access to them in the meantime. Defendant is declared to have forfeited the lobolo cattle already paid but is allowed to retain the balance of three head not yet paid. No order as to costs subsequent to date of tender."

Appellant is disappointed with this decision because she considers she should have been awarded full costs and allowed to retain the permanent custody of the children.

It is clear from the evidence that she not only claims the custody of the children but also whatever property rights may accrue on them hereafter; but it is recognised native law that although a mother may in certain circumstances be allowed the temporary care of her children, the property rights in them always vest in the father, and this claim has not been seriously advanced on appeal, nor can it be supported. In allowing Appellant her costs only up to the time of Respondent's offer, the Commissioner took the view that the claim to the children was really the main issue in dispute, and that but for Appellant's insistence in claiming to retain the children, the case could have been disposed of then and there without the necessity of calling further evidence. He appears, however, to have overlooked the fact that Respondent's offer was conditional upon his having the immediate custody of the children awarded to him and the refund of six or seven head of lobolo cattle, in both of which claims he failed to succeed after a full hearing on the facts.

Furthermore, the divorce was granted on the grounds of the illtreatment of the woman, so that Appellant succeeded on all issues except the one in which she demanded the permanent custody of her children, and even here she was given their temporary custody.

In these circumstances we consider that Appellant should have been awarded full costs. The appeal will accordingly be sustained in part and the judgment of the lower Court amended to one in Plaintiff's (Appellant's) favour for full costs. She will be awarded the costs of this appeal.

CASE NO. 5.

NHLABALUHIDI MKWANAZI VS. BULANDABUNJANI MNCUBE

DURBAN. 3rd April, 1933. Before H.C. Lugg, Esq., President, Messrs. J.T. Braatvedt and A. Eyles, Members of the Native Appeal Court (Transvaal and Natal Division).

Difference between default of payment and tort - Damages.

An appeal from the Court of the Native Commissioner, Vryheid.

TO .....

TO SUCCEED IN A CLAIM FOR DAMAGES A PLAINTIFF MUST SHOW THAT THE INJURY SUFFERED WAS THE DIRECT RESULT OF THE DEFENDANT'S ACT OR THE NATURAL AND PROBABLE CONSEQUENCE THEREOF.

Plaintiff had a claim for cattle against one Zililo, and it was agreed between them that as the Defendant owed the latter seven head of cattle he should hand these over to Plaintiff. Defendant thereupon signed a document by which he agreed to deliver seven head of cattle to the Plaintiff. He handed over three and promised to deliver the balance, but failed to do so.

Plaintiff, relying on Defendant's promise, arranged to pay all seven he was to receive, to his brother-in-law as lobolo on the latter's sister but was obliged, owing to the Defendant's default, to make up the deficiency by purchasing four others elsewhere at a cost of £5.10.0.

He then sued Defendant for the recovery of this sum and £5 damages - subsequently reduced to £3 - alleged to have been caused by Defendant's neglect in failing to comply with his undertaking, and was awarded judgment for the £5.10.0 the value of the four cattle due and 10/- damages with costs by the Assistant Native Commissioner, Vryheid.

This appeal is only against the 10/- awarded as damage.

The Native Commissioner has found as a fact that the cattle which give rise to this action were actually the property of Zililo and were in the possession of Defendant under the custom of sisa; and he has held Defendant liable for having unlawfully detained them when he should have handed them over to Plaintiff in terms of the agreement. There is, however, no evidence on record to support or even suggest that Defendant was in possession of sisa stock the ownership of which had vested in Zililo; nor does the summons allege that Defendant had unlawfully retained possession of such sisa stock the ownership in which had subsequently passed to Plaintiff. All we have is that Zililo claimed to be the owner of a certain cow in the possession of Defendant which by the effluxion of time Plaintiff considered had increased to seven head and assessed his claim accordingly. Defendant on the other hand stated that the cow had died and actually denied owing any cattle to Zililo and only signed the document admitting his indebtedness because Plaintiff said he was entitled to them. This is somewhat a lame excuse, but the point to bear in mind is that Plaintiff had not established ownership to certain specific cattle in the possession of Defendant. All he has done is to show that he had a right to recover seven head from him and consequently it seems to me that Defendant's default merely amounted to a breach of contract and not a tort.

In the absence, therefore, of evidence to show that Plaintiff entered into the undertaking with his brother-in-law on an assurance by Defendant that the latter would see him through with the transaction by doing his share within the time stipulated, and but for which inducement Plaintiff would not have entered into contractual relations with his brother-in-law, Defendant cannot be held liable. No such averment is contained in the summons nor is it suggested in the evidence. The position

of Defendant appears to be no different from that of an ordinary debtor who promises but fails to fulfil his obligation with his creditor. The fact that he was aware, as is alleged, of Plaintiff's obligation to a third party, and that his default would lead to loss and inconvenience to Plaintiff does not affect the position. In the absence of a contractual arrangement such as has been indicated or that Defendant had wrongfully detained cattle the dominium in which had actually passed from Zililo to Plaintiff and had thereby committed a delict, his failure in the circumstances shown is too remote an element to entitle Plaintiff to recover damages. To succeed a Plaintiff must show that the injury suffered was the direct result of the Defendant's act or the natural and probable consequence thereof.

The appeal will therefore be sustained and the Native Commissioner's judgment amended by the deletion of the 10/- awarded as damages together with the costs of this appeal. The rest of the judgment will not be disturbed as it is not before us.

As the point was raised in the Court below it is necessary to add that the value of £5 fixed by section 86 of the New Code as a monetary equivalent of a lobolo beast, only applies to lobolo paid on a woman's marriage and to such other transactions as are included within the scope of Chapter X of the New Code, but not to matters not so included.

CASE NO. 6.

NYOSANA NGCOBO VS. GEDHLEMBANA NENE.

DURBAN. 6th April, 1933. Before H.C. Lugg, Esq., President, Messrs. J.T. Braatvedt and A. Eyles, Members of the Native Appeal Court (Transvaal and Natal Division).

Application for adjournment - Plaintiff absent - Default not wilful - Dismissal of summons.

An appeal from the Court of the Native Commissioner, Ndwedwe.

A PARTY IS NOT IN WILFUL DEFAULT WHERE HE HAS ACTED BONA FIDE AND SHOULD NOT SUFFER THROUGH THE OMISSION OF HIS ATTORNEY.

Appellant interpleaded for the release of three head of cattle attached in the matter of Gedhlembana Nene vs.Mkunjeni Kuzwayo and the matter was set down for hearing for the 27th January last before the Acting Assistant Native Commissioner, Ndwedwe.

Two days before the hearing Appellant's Attorneys, who reside in Durban some 36 miles from the Court, and who had just been retained by him, wrote to the Clerk of the Court asking him to arrange for an adjournment for a fortnight to enable them to enquire into the matter and prepare their client's case.

This letter was received by the Clerk of the Court the day before the application was heard, and it so happened that he was the same officer who disposed of the case the next day as Acting Assistant Native Commissioner.

No reply was sent by him to this request, nor were any further representations received by him from Appellant's Attorneys up to the time the case was called on at 11.30 a.m. on the 27th when, owing to Appellant's default, the summons was dismissed with costs.

The Acting Commissioner says he took this action because he regarded Appellant's default as wilful; and he has also commented on the tendency to laxity in Commissioners' Courts, and the need for stricter adherence to the rules. He also remarks that where adjournments are applied for he always insists on the personal appearance of the party seeking the adjournment otherwise he is made to suffer the consequences as was done in this case. We are unable to share this view. If a party is properly represented by an attorney there can be no object in insisting on the appearance of a party in an informal matter such as this, nor would it be conforming with the spirit or intention of the rules.

On wilful default, the cases cited by Buckle & Jones at pp. 355-6 (Second Edition) offer a very useful guide. "Wilful default" means deliberate default, so that where a defendant had been ill and had gone away for a change, and his solicitor had neglected to file a plea, he was allowed to re-open where a default judgment had been given against him (Hitchcock vs. Raaf 1920 T.P.D. 366). So also in the case of Heinze vs. van Aardt, 1920 S.W.A. 61 it was held that a defendant is not in wilful default where he has acted bona fide, and should not suffer through the omission of his attorney.

This is exactly a case in point. We have come to the conclusion that the Commissioner acted hastily and without exercising a proper judicial discretion. Appellant's attorneys may not have been warranted in concluding that their application for an adjournment would be granted. They had no information that their letter had reached the Clerk of Court, and the least they could have done was to have ascertained by telegram or telephone on the morning of the 27th how matters stood, but their failure to do so should not be laid at the door of the Appellant becarse native like, having placed matters in the hands of his attorneys he would naturally leave it to them to attend to these. Making allowance for all this, there was nothing before the Commissioner from which he was justified in attacking Appellant's bona fides. The application was a reasonable one, and subject to his bearing the costs, the adjournment should have been granted to Appellant.

The appeal will be sustained with costs and the Commissioner's order set aside with costs.

CASE NO. 7.

MKULUZI MPUNGOSE VS. SIPOSO MPUNGOSE.

DURBAN. 10th April, 1933. Before H.C. Lugg, Esq., President, Messrs. J.T. Braatvedt and A. Eyles, Members of the Native Appeal Court (Transvaal and Natal Division).

Inheritance .....

Inheritance and Succession - Hereditary Chief, Zululand - Donatio mortis causa - Section 38 of Code of 1878 - Testamentary bequest - Ukuvusa custom.

An appeal from the Court of Native Commissioner, Eshowe.

BY ACCEPTING A CONTRIBUTION OF TRIBAL CATTLE FOR THE LOBOLO OF HIS CHIEF WIFE, A CHIEF BECOMES CONTRACTUALLY BOUND TO HIS TRIBE TO RECOGNISE HER AS SUCH AND HER FIRST BORN SON AS THE HEIR APPARENT TO THE CHIEFTAINSHIP. IF HE DESIRES TO APPOINT ANOTHER SON TO THE CHIEFTAINSHIP TO THE EXCLUSION OF THE GENERAL HEIR HE CAN ONLY DO SO WITH THE EXPRESS APPROVAL OF THE TRIBE.

The parties are sons of the late Mbango Mpungose, and members of one of the most important tribes in Zululand.

The Mpungose people consist of several sections, chief of which is Mbango's section. It is recognised as the indhlunkulu or main stem and its head must be regarded as a chief of hereditary rank.

The grandfather of the parties, the late Gawozi Mpungose, had several sons by his chief wife, the three eldest being Mkumbuzi, Ndabinjani and Mbango. Mkumbuzi died unmarried and was succeeded by Ndabinjani as heir presumptive to the chieftainship.

Gawozi predeceased his son Ndabinjani but during his lifetime presented him with a girl Nokufa whom he had received from Chief Hanu, the son of Mpande, in connection with a transaction over a gun. She was the daughter of one Zembe, a commoner. This girl Gawozi presented to Ndabinjani to be one of his wives, but the latter died before marrying her. Ndabinjani was nevertheless a married man with several wives with a son Mjojeni surviving him when he died.

On the death of Ndabinjani, Mbango succeeded to the Chieftainship. He then married Nokufa who bore the present Respondent, and we are told that he was already born and a small boy when Mjojeni died. After marrying Nokufa, Mbango also contracted ukungena unions with Ndabinjani's widows, but only one son was born to these - a boy named Maloba - but he died before attaining manhood.

It is of considerable importance to bear these facts in mind as they have considerable bearing on the issues as will be shown later.

Nokufa bore the present Respondent, Siposo.

Mbango had numerous other wives apart from Nokufa, but I will confine myself to only four of them because the rest do not appear to have held any particular status in the kraal.

It is established that Mbango's chief wife or inkosikazi was Oka-Dabulamanzi, and affiliated to her in order of priority were Oka-Mtiyaqwa, Oka-Ntshingwayo and Na-Muli. The present Appellant is the eldest son of Oka-Mtiyaqwa.

Mbango's chief source of substance was acquired by him from the estate of his deceased brother Ndabinjani, there being nothing of much value secured from other sources. Chief Mbango died on the 5th of November, 1919, and it is alleged that when on the point of death he made a disposition by which he declared Zulumpungose, the only son of his chief wife to be his general heir, and Respondent as heir to the estate of Ndabinjani as well as Chief of the tribe.

This declaration is embodied in a report lodged at the Magistrate's office on the following day by Ndabayake Mpungose and Makosana Ngema. It is in the handwriting of Mr. Martin Oftebro and is to the following effect:

"Appears Ndabayake Mpungose Ka Masompo and Makosana Ngema - state.

"Yesterday, November 5th, the Chief Mbango, in the presence of the ibandhla, made the following declaration:

"I know that my death is imminent and desire to acquaint you with my disposition:-

"Siposo is Gaozi. He is to be head of the Mpungose, with Vumbe of Ecukwaneni kraal as 'umnawe'.

"As regards my personal establishment I declare that Nqumile, the daughter of Dabulamanzi is my chief wife, and her son Zulumpungose is my heir.

"I bequeath to my son Mkuluzi the two daughters I have by Oka Ntshingwayo; Mkuluzi's own sister will be etulad to Zulumpungose.

"For the position of "uyise" or "father of the kraal" I appoint Makuzela alias Mehlabuka his mother being the daughter of Soshangana Biyela Ka Menziwa.

"Ikohlo.

"Mgedhleleni of the Obedweni kraal is the heir of the ikohlo; he will receive the lobolo for his sister.

"Note: Mbango established a kraal of his own, and named it 'Felandawonye". In this kraal he placed Oka Dabulamanzi with three other wives - These three died and the kraal became extinct - Oka Dabulamanzi was accommodated with a hut, outside, but close to the Nomaqoni - She, however, elected to join her brother Bangani at Nkonjeni."

A dispute subsequently arose between the present Respondent Siposo and Zulumpungose over succession to the chieftainship. A board was appointed by the Government and after inquiring it found in favour of Zulumpungose, declaring him to be the eldest son of the chief wife, and on its recommendation he was appointed Chief, but he died very shortly after.

Respondent Siposo was then appointed to succeed him, and we are given to understand that this was done on the recommendation of the local Magistrate in consequence of the present Appellant having waived his claims to the position. Being the

eldest son to the first affiliated wife, one would naturally expect that he would have had first claim to the chieftainship in succession to Zulumpungose, but Appellant now states that he was induced to waive his claim because he was only a youth working in Durban at the time. He feared that he might share the fate of his several brothers, and that he was too young to undertake the responsibilities of office. We are, however, not concerned with this aspect of the case as it is one which can only be dealt with by the Supreme Chief.

In June, 1931, Appellant instituted a claim before the Native Commissioner, Eshowe, against Respondent to be declared general heir to the estate of their late father, Mbango, by virtue of being the only son of Mtiyaqwa the first affiliated wife of the chief house, and as such entitled to all property to the chief house i.e. which had vested in the general heir, the late Zulumpungose, including that which had been acquired by Mbango from Ndabinjani's estate.

Respondent in resisting the claim contended that Appellant had no locus standi as the rightful person to succeed to the chief house as general heir was Madiya, the son of the woman Ma-Ntuli, and denied that Oka-Ntiyaqwa had been affiliated to the chief house as alleged by Appellant. He further disclaimed the right of either, however, to succeed to the estate of Ndabinjani or to the chieftainship as he had acquired both under the disposition made by his father on his deathbed. The Commissioner granted absolution, and on appeal to this Court the matter was referred back for further evidence and for the citation of Madiya as co-defendant with Respondent. At the further hearing Madiya abandoned his claim in favour of Appelland thus leaving the issues as they were originally.

Additional evidence of considerable length has since been taken and on it the Commissioner has recorded a judgment declaring Appellant to be the general heir to the estate of the late Zulumpungose i.e. of the chief house (Oka-Dabulamanzi) and as such entitled to eight sheep, a shot gun and the progeny of a beast acquired from one Pennyfather, but disallowed his claim to Ndabinjani's estate, holding that this property had been validly acquired by Respondent Siposo under Mbango's disposition. He also disallowed Appellant his costs on the ground that he had only succeeded in recovering a very minor portion of his claim.

Only that portion of the judgment disallowing Ndabinjani's estate, and the order for costs have been brought in appeal. We must therefore assume that the Native Commissioner's judgment in respect of the other portion of the claim has been accepted. Beyond remarking that there is ample evidence to support the Commissioner's finding in regard to the latter, we might add that Respondent's rights to Ndabinjani's estate property is supported by three of Appellant's own witnesses Oka-Dabulamanzi, Nkindile Mpungose and Nqina Mpungose i.e. in so far as it was awarded under Mbango's disposition. Mbango's brother Magwelana also supports him, but Mr. Milne has raised the important question as to the validity of this donation in the circumstances disclosed. He contends that it amounted to a testamentary disposition and therefore invalid by reason of Section 38 of the 1878 Code. This Section reads as follows.-

"The head of a kraal has absolute power of selling or pledging, during his lifetime, both house property and kraal

property.....

property, but has no power of regulating by will or otherwise the devolution of either remaining undisposed of at his death. It is usual for him to consult the wife of any house in reference to the disposal of property of the house. The chief may interfere to prevent dissipation by the head of the kraal or family of the property of any house or of the kraal."

In dealing with this aspect of the case it is necessary to refer to the manner in which Natives, more especially hereditary chiefs, establish their kraals. It will also be necessary to place a very restricted and narrow interpretation on Section 38, otherwise we may be acting in conflict with the rights which Natives have long enjoyed and still enjoy under native law and custom as embodied in the existing and preceding Codes.

It is usual, especially with Chiefs of hereditary rank, not to arrange their kraal affairs or to appoint a chief wife until late in life, and frequently the heir is not disclosed until the chief is on the point of death. The reasons for this are obvious, but although these arrangements are not made publicly known, the position of the wives in a chief's kraal and their status are usually matters of general knowledge either by the way they were acquired and in the manner in which they are grouped, any disclosure by a kraalhead on the eve of his death being merely a confirmation of what has already been provided. This is well illustrated in the present case. It has been established that the chief wife was acquired with tribal cattle and that a number of these were also used for the lobolo of the first affiliated wife Oka-Mtiyaqwa, acts which would leave no doubt in the Native mind as to their relative positions in the kraal.

Had therefore Mbango's declaration on his death-bed amounted to nothing more than the mere confirmation of what he had previously arranged I would not have been prepared to hold that that amounted to a disposition as contemplated by section 38. Further, section 38 only refers to kraal and house property, and not to the fixing of status of the several houses in a kraal. Strictly any restrictions regarding testamentary dispositions should have been confined to house property as now laid down in Section 23 of the Native Administration Act and Section 108 of the new Code. If, therefore, it can be shown that Mbango performed any act during his lifetime which would indicate that he was reviving his deceased brother's estate through the medium of the woman Nokufa, this principle must apply, but I can find none.

We are told that Nokufa was married to Mbango under the usual wedding ceremony before he contracted ukungena unions with Ndabinjani's widows. She became an inmate of the indhlunkulu establishment without being given any specific status, and it seems clear to me that Mbango had no intention whatever, when he married her, to use her as he could have doen, to vusa or revive the name of his dead brother as there was no necessity to do so.

Ndabinjani's son, Mjojeni, had already been born when Mbango married Nokufa and only died after the birth of Respondent and when the latter was a small boy. Mbango could therefore have only had one object in view when he ngena-d

Ndabinjani's widows, and that was to enrich the estate as the raising of an heir was unnecessary.

By contracting these unions with the widows Mbango recognised the estate as an entirely separate establishment from his own, and one to which he could lay no claim either as against Mjojeni, had he lived, or the ukungena son Maloba had he survived, and it was only on the demise of these two and Mbango's failure to raise any other son by ukungena that the estate finally vested in him.

It would still have been competent for him, however, to have then revived the name of his deceased brother under the custom of ukuvusa by instituting Respondent as heir to the estate because of the fact that Nokufa had been acquired by him from this estate, but apart from Mbango's declaration on his deathbed there is nothing to indicate that subsequent to the death of Mjojeni and Maloba, Mbango made any declaration to this effect. What then was the motive for Mbango to act in a way which led to the virtual disinherison of the general heir by depriving him of the chieftainship and the greater portion of the estate?

I can only conclude that it was due to his having fallen out with his chief wife owing to her conversion to Christianity for this led to her being ostracised by him and by many of his tribe.

Mbango must be regarded as an hereditary chief. By accepting a contribution of tribal cattle for the lobolo of his chief wife he became contractually bound to his tribe to recognise her as such and her first born son as the heir apparent to the chieftainship.

In dealing with this aspect Campbell, J.P. in Bevu vs. Laduma 1900 N.H.C. 27, stated: "The taking or elevation of a chief wife is in the nature of a compact with the tribe; it is more than an understanding. To secure its validity the chief must have the loyal support of his tribe, and to have that they must be told of and take part in the proceedings, and that in a very special way."

Again in Puputa vs. Lokotwayo 1900 N.H.C. 40 we find the same Judge saying: "The marriage of the principal wife of a chief cannot be a matter of surprise, or arranged for in a clandestine manner. It is absolutely necessary that he should not only consult the tribe, but have their approval of every important step taken."

If, therefore, Mbango wished to appoint Respondent to the chieftainship to the exclusion of the general heir he could only have done so with the express approval of the tribe; but it was not consulted. They were taken completely by surprise, and I regard the whole incident with grave suspicion and the disposition as one of those which the legislature had in mind when Section 38 was introduced into the Code of 1878.

I am therefore of opinion that Mbango's deathbed disposition was invalid. Appellant is therefore entitled to succeed to this portion of the claim also.

The appeal will accordingly be sustained and the judgment of the Assistant Native Commissioner amended to one

declaring.....

declaring Appellant entitled to the property in Ndabinjani's estate with full costs.

He will also be awarded the costs of this appeal.

CASE NO. 8.

NTSWELABOYA MBANJWA VS. NGIDI TSHEZI.

DURBAN. 10th April, 1933. Before H.C. Lugg, Esq., President, Messrs. J.T. Braatvedt and E. Eyles, Members of the Native Appeal Court (Transvaal and Natal Division).

Application for review - Powers of Native Appeal Court under Section 15 Act 38 of 1927.

An application to set aside by way of review proceedings before the Court of Native Commissioner, Bulwer.

THIS COURT CAN ONLY DEAL WITH MATTERS ON REVIEW WHERE THERE HAS BEEN A GROSS IRREGULARITY IN PROCEDURE AND NOT WHERE THE COURT HAS ARRIVED AT A WRONG DECISION ON THE LAW OR THE FACTS.

This is an application by the Plaintiff Ntswelaboya in the form of a review for the setting aside of an order of the Native Commissioner at Bulwer dismissing the Plaintiff's summons.

On the 7th of January, 1932, Messrs. A.J. McGibbon & Brokensha, Attorneys of Pietermaritzburg issued a summons on behalf of the Plaintiff claiming the setting aside of a certain judgment given on the 10th of September, 1931, against Ntswelaboya in favour of Ngidi on the grounds that the said judgment had been obtained by fraud.

On the 19th of January, 1932, the return date of the summons, both parties were legally represented and at their request the case was adjourned to the 9th of February, 1932. On the latter date the Plaintiff Ntswelaboya appeared in person but his Attorney was absent. It would appear that the absence of the latter was due to a misunderstanding between him and Defendant's Attorney, with regard to which, however, we are not concerned. Suffice it to say that the summons was then dismissed by the Commissioner on exception.

The record unfortunately does not disclose what specific objections were raised but the Commissioner in his reasons for judgment states, inter alia, "the summons did not set out the names of the witnesses alleged to have been bribed or give any particulars of the time or place or the offer made to the witnesses alleged to have been bribed."

Twelve months have lapsed since this order was made and we are now being asked to set it aside by review and not by way of appeal.

Powers of review have been conferred on this Court by Section 15 of the Native Administration Act, but it would appear that these powers have so far not been taken advantage of, the only similar case being that of Fiti Sitebe vs. Johnny Sitbee 1930 N.A.C. (N. & T.), Blaine p. 99, where it was held that the power to review any irregularity could only be exercised by way of appeal. This ruling is embodied in the headnote of the report but is not referred to in the judgment so that it does not furnish a guide.

It is obvious that the Plaintiff, an uneducated Native, could not have been expected to offer any sensible argument in answer to the technical objections raised, but this Court is entitled to presume that Plaintiff was acquainted with the proceedings and it was open to him to have applied to the Court for a further adjournment of the case, if he so desired, to enable him to get into touch with his Attorney; this he apparently failed to do.

The action of the Commissioner in dismissing the summons as he did may be criticised as having been somewhat hasty and the Court is inclined to this view; this, however, falls far short of declaring the action of the Commissioner to be an irregularity of such a nature as would justify this Court in interfering. This Court can only deal with matters on review where there has been a gross irregularity in procedure, and not where the Court has arrived at a wrong decision on the law or the facts. The order was in effect a legal interpretation upon the claim set out in the summons and in the circumstances a perfectly competent order and not an irregularity in the proceedings calling for the interference of this Court. Plaintiff's correct remedy was by way of an appeal on the merits of the order or the re-issue of the summons.

Explanations were tendered to the Court in regard to the absence of the Plaintiff's Attorney on the 9th of February, 1932, but these do not concern this Court which has to judge the action of the Commissioner in the light of the circumstances as they were known to him when he came to his decision.

The application is accordingly dismissed with costs.

CASE NO. 9.

MAGULA MTEMBU VS. MASHINYONI MTEMBU.

DURBAN. 11th April, 1933. Before H.C. Lugg, Esq., President, Messrs. J.T. Braatvedt and A. Eyles, Members of the Native Appeal Court (Transvaal and Natal Division).

Execution - Costs - Attachment of cattle.

Appeal from the Court of the Native Commissioner, Lower Umfolozi.

IN THE ABSENCE OF AGREEMENT BETWEEN THE PARTIES, A BEAST ATTACHED FOR COSTS MUST BE SOLD BY THE MESSENGER IN TERMS OF THE RULES OF COURT AND ANY SURPLUS OF THE PROCEEDS OF THE SALE HANDED TO THE EXECUTION DEBTOR.

This case presents no difficulties. The facts are as follows.

Appellant obtained judgment for four head of cattle in the Court of Chief Msiyana against the Respondent who thereupon offered four head of cattle in payment - one, a bull, which he said was in Chief Zanya's ward and three head at the kraal of Bulukwe in Chief Manqamu's ward. The beast in Chief Zanya's ward was duly delivered to Appellant; but when Appellant went to Bulukwe to obtain the three head which were alleged to be at his kraal, he was informed that the judgment debtor (Respondent) had no cattle at the kraal. Appellant then obtained a writ of execution under which he recovered four head of cattle from Respondent. Three of these were in satisfaction of the balance of the judgment debt and the fourth was allocated towards the costs in the case. Respondent then claimed the return of the four head attached under the writ and five pounds (£5) as and for damages on the grounds that he had already discharged the judgment debt by payment of the cattle at Bulukwe's kraal. The Native Commissioner, Lower Umfolozi, allowed the claim as regards the return of the cattle and fixed damages in the sum of two pounds (£2). This appeal is against that judgment.

It would appear that Appellant consented to accept the three head of cattle which were described by Respondent as being at Bulukwe's kraal and, acting in all good faith, he went to Bulukwe only to be informed that liability to Respondent for three head of cattle was not admitted. Bulukwe made the position quite clear. He said he admitted owing one Mhlekiseni, the heir of the late Mkokoba, three head of cattle which he would deliver on demand being made by Mhlekiseni. He went on to state that in his opinion Respondent had a good claim against the estate of the late Mkokoba for three kead of cattle.

Clearly then, the judgment debtor's (Respondent's) offer of the cattle at Bulukwe's amounted to a tender of property in which he had not himself the dominium and he could not transfer to Respondent any greater right than he had himself, for "Nemo dare potest quod non habet". In these circumstances the original rights were restored to Appellant to enforce payment of the cattle in pursuance of the judgment he had obtained in a competent Court.

In his meagre reasons for judgment the Native Commissioner finds as a fact that Appellant refused to accompany the Chief's messenger to Bulukwe's kraal. There is no evidence on the record to support that finding. The facts are that the Messenger claimed what Appellant considered was an exorbitant fee, viz. one pound, and that he went without him. It is not understood why this fee should be payable by the Appellant who was the judgment creditor and entitled to his costs. At all events, it was the duty of Respondent as the judgment debtor to cause payment to be made. The record negatives any readiness on his part to discharge the debt.

It only remains to be said that the summary allocation of the one beast towards costs is irregular. In the absence of agreement between the parties, the beast so attached must be sold by the Messenger in terms of the Rules of Court and any surplus of the proceeds of the sale handed to Respondent.

The contention advanced by Respondent's counsel that the attachment was bad in as much as it was made from the Commissioner's Court and not from the Chief's cannot be accepted. The validity of the writ is not in issue today and the maxim omnia praesumuntur rite esse acta prevails, and the contention must therefore be overruled.

The appeal is sustained with costs and the judgment of the Native Commissioner set aside and he is directed to order the sale of the beast attached to cover costs of execution, any surplus remaining to be paid to Respondent.

CASE NO. 10.

ALFRED FYNN VS.HARRY FYNN.

DURBAN. 12th April, 1933. Before H.C. Lugg, Esq., President, Messrs. J.T. Braatvedt and A. Eyles, Members of the Native Appeal Court (Transvaal and Natal Division).

Definition of "Native". Act 38/1927 - Status, Coloured persons - Tests - Jurisdiction of Native Commissioner's Court.

An appeal from the Court of the Native Commissioner, Umzinto.

THE TERM "NATIVE" IS NOT LIMITED TO PERSONS OF PURE BLOOD BUT ALSO INCLUDES THOSE OF MIXED BLOOD AND THE CORRECT TEST TO APPLY IS THE ONE OF RACIAL TYPE, A TERM WHICH INCLUDES RACIAL CHARACTERISTICS AND SOCIAL ENVIRONMENT.

The parties to this action are coloured persons and lineal descendants of the late Frank Fynn, a European, who married a number of native women in Natal by Native custom prior to the annexation of that Province by the British Government.

Respondent is the owner of the farm Campania in the Umzinto District on which there is an eating house occupied by Appellant. The former sued for Appellant's ejectment from these premises and the action was instituted before the Court of the Native Commissioner where exception was taken to its jurisdiction on the grounds that the parties were not Natives within the meaning of the term "Native" in the Native Administration Act, No. 38, 1927.

The Assistant Native Commissioner, applying the test of civil status as indicated in the case of Govu vs. Stuart, 24 N.L.R. 440 and Dunn vs. Rex, 28 N.L.R. 56, held that they were Natives and overruled the exception.

Mr. Browne in a lengthy and able argument has contended that the true test to have applied should have been the one of (a) appearance; (b) habits of life and (c) preponderance of blood, but that even assuming that the Commissioner had applied the correct test there was ample evidence and authority to show that Frank Fynn's children were legitimate.

Mr. Darby on the other hand, in supporting the Commissioner's finding also relied largely on the two Natal cases, but contended that the off-spring were illegitimate and consequently Natives as they followed the status of their mothers.

As against this Mr. Browne argued that the cases of Govu vs. Stuart and Dunn vs. Rex were wrongly decided and cited the case of Seedat's Executors vs. The Master (Natal) 1917 A.D. 302. Here it was held that whilst a foreign polygamous marriage could not be recognised in South Africa, the off-spring of such a marriage, if legitimate according to the laws of the domicile of origin, will be regarded as legitimate here. He therefore urged that as the unions contracted by Frank Fynn with these native women were recognised by the Natives themselves, and contracted as they were in Natal whilst it was an independent native territory, the children must be regarded as having been legitimate although the marriages themselves would not necessarily be recognised in a British Colony.

Whether we accept this contention or not seems to me to be of little consequence in view of the decision given in Anderson vs. Green, 1932 N.P.D. 241 where in a not dissimilar matter, and where all the leading authorities on the question were exhaustively dealt with, the test of civil status was definitely rejected.

In that case the Plaintiff, Anderson, claimed a provisional judgment on a mortgage bond passed by the Defendant, Green, who had described himself as "Charles Green of Ixopo, Natal, Farmer", and who was the illegitimate son of a native woman by a European. He opposed the granting of the order on the grounds that he was a Native. In doing so he relied on certain provisions of Act 41, 1908 (N), which regulates the lending of money to Natives and which had not been complied with, and also on Section 1(1) of the Natives Land Act No. 27, 1913, requiring the prior consent of the Governor-General in certain transactions, the which had not been obtained. He held Letters of Exemption exempting him from the operation of Native Law.

The Court held that he had failed to discharge the onus of proving that he was amenable to the provisions of these two acts and granted the provisional order.

In coming to this conclusion the Court rejected as I have already stated, the test of civil status as applied in the cases of Govu vs. Stuart and Dunn vs. Rex (supra), and held that the primary question for consideration was the language, scope and objects of the two enactments on which Defendant had relied in order to ascertain whether he was amenable to their provisions or not; and for the purpose of these two Acts it found that the term "Native" was not limited to persons of pure blood but also included those of mixed blood; and that the correct test to apply was the one of racial type, a term which includes racial characteristics and social environment.

In deciding the present appeal we must also be guided by like principles and ascertain whether the parties, or one of them, are amenable to the Native Administration Act

or not, having due regard to its language.

This Act, as the title shows, was enacted for the purpose of providing better control and management of Native Affairs; administration was vested in the person of the Governor-General as Supreme Chief; special courts were set up to deal with purely native matters, whilst recognition was given to lobolo, native law and custom, and tribal government.

It must be conceded that whilst this measure is of great benefit to the large mass of Natives living in the Union, there must be cases even amongst those of pure blood where its provisions might prove harsh and unsuitable. I refer to those individual cases where the Native has advanced to a stage in the scale of civilisation where it would be more appropriate to apply European then native law to him, but the Act makes no distinction. His only relief is to obtain letters of exemption, but even this would not necessarily exempt him from all the provisions of the Native Administration Act.

We find similar lines of demarcation with coloured persons. With a large number it would be just as undesirable to apply European Law to them as to the ordinary Native. There are a large number of the Fynn family living in our native reserves under conditions little removed from those of the aboriginal Native. They have their recognised chiefs and have contracted polygamous marriages, and the only law they understand and want is native law; but there are others again who are on an entirely different footing.

It therefore seems to me that where we find this class of persons living under entirely different sets of conditions by reason of which they can be readily divided into two social groups it would be undesirable on the grounds of public policy to treat them all alike and to apply native law to them. This, I think, is clearly indicated in the proviso of the definition of the word "Native" in the Native Administration Act itself which includes within its ambit those persons resident in scheduled native areas under the same conditions as a Native, and by implication excludes those living otherwise than as Natives.

These considerations are supported by the fact that for many years now the superior courts of the Union have consistently rejected the test of civil status and applied that of racial type when interpreting acts which, for convenience, can be grouped under the term "class legislation".

After carefully considering the Native Administration Act as a whole it seems to me abundantly clear that it includes within its scope coloured persons who are on the same footing as Natives whilst at the same time it provides an avenue of escape by implication for those who are not.

After comparing this Act with the two Acts which called for consideration in the case of Anderson vs. Green (supra), I can find no grounds which would in the present case justify a departure from the test there applied.

The racial type test therefore resolves itself into an individual one, depending on conduct for permanency, and

may be lost by reversion to native conditions of living.

Respondent is a coloured person with pronounced European features and without the characteristics of a Native; and the Commissioner has recorded that his mode of living is that of a European. Appellant, on the other hand, is of darker complexion but with features more approximating those of a European than a Native, and his habits of life and mode of living are recorded as being those of a European.

In the circumstances, therefore, it would appear that the parties belong to a class to which at the moment the Native Administration Act cannot be applied, and are consequently not subject to the jurisdiction of the Native Commissioner's Court.

I can find no indication in the several cases cited as to what test should be applied in fixing the standard of living required of these people, but I assume that they should conform to the mode of living and habits of the average European.

The appeal will be sustained and the ruling of the Native Commissioner set aside with costs.

Per Eyles.

The Plaintiff in this matter issued summons against the Defendant in the Court of the Native Commissioner for the District of Umzinto and on the return date exception was taken to the summons that the Court had no jurisdiction on the grounds that both parties to the action were not Natives and consequently not amenable to the jurisdiction of the Native Commissioner's Court. This exception was overruled by the Native Commissioner who held that the parties were Natives within the meaning of the Native Administration Act. The Defendant in the Court below has appealed against this ruling.

The essential facts are as follows: Both the parties are descendants of one Frank Fynn by his wife Ntumbazi, a Native woman whom Fynn married according to Native custom, prior to the annexation of Natal. The eldest son of this union was George Fynn who married a coloured woman Maria Ogle, his only wife, according to European civil marriage rites. The Plaintiff Fynn is a son of George Fynn.

Another son of George Fynn is "Offie" Fynn who married Minnie Shezi, a Native woman, according to European civil marriage rites and Defendant is the issue of this marriage.

Frank Fynn was of pure European descent.

The parties to this case are coloured people and their mode of living is that of Europeans though Native blood predominates.

It is contended by Mr. Browne on behalf of the Appellant that the parties do not fall within the term "Native" as defined in Section 35 of Act 38 of 1927, the tests he applies being those laid down repeatedly in various Supreme Courts of South Africa viz. (a) appearance, (b) habits of life and (c) preponderance of blood.

On.....

On the other hand Mr. Darby claims that the correct test to be applied is that of the civil status acquired by descent from George Fynn and on the authority of Govu vs.Stuart, 1903 N.L.R. 440 and Rex vs. Dunn, 1907 N.L.R. 56 contends that George Fynn was an illegitimate son and according to our law acquired the status of his mother, a Native, which status was passed on to his sons and grandsons.

Several authorities have been quoted all of which have been carefully considered.

The definition with which this Court is immediately concerned is that set out in the Native Administration Act of 1927 which reads, "Native shall include any person who is a member of any aboriginal race or tribe of Africa." The proviso which follows these words does not affect the present issue.

The Natal Supreme Court in the case of Govu vs. Stuart applied the test of civil status, the issue in that case being the same as the matter now before this Court, it is therefore a very strong authority in favour of Mr. Darby's contention. The later case of Rex vs. Dunn confirmed the decision in Govu's case but was a prosecution under the Liquor Law and was therefore more restricted in its scope than the earlier decision.

In the cases of Queen vs. Parrot, 1899 S.C.454, Rex vs. Auret 1919 E.D.L. 32, Rex vs. Swarts 1924 T.P.D. 421, Rex vs. Sonnenfeld, 1926 T.P.D. 597 and Rex vs. Tshwete, 1931 E.D.L., it was consistently laid down that appearance, habits of life and preponderance of blood were the tests to be applied in deciding the issue as to whether a particular individual was either a Native or a coloured person, no reference whatsoever being made to the question of legitimacy or otherwise of the birth. In the case of Rex vs. Tshwete it was actually on record that the person whose status was in dispute was the illegitimate son of a Native woman by a European, nevertheless the only test applied was that of appearance.

It is common knowledge which this Court is entitled to take judicial cognizance of that as the result of contact between Europeans and Natives in South Africa a distinct class of people has come into being who have an admixture of both European and Native blood and who are usually referred to as "coloured" people.

As an example of legislative recognition of this fact we have the Union Liquor Act 30, 1928, which defines "Coloured person" as "Any person who is neither a European nor an Asiatic nor a Native."

The habits of life of coloured people are, in general, not those of Natives.

"Border line" cases will no doubt be found of persons who proximate more to Europeans on the one hand or more to Natives on the other, nevertheless, the general body of coloured people is clearly distinguishable from either Europeans or Natives.

An examination of the provisions of Act 38 of 1927 shows that its object was "To provide for the better control

and.....

and management of Native Affairs" and includes such matters as the recognition of Native Law and custom; Native rules of succession; lobolo or bogadi; legislation by proclamation etc., thus establishing a system of law and administration apart from the common law of the land and suited to only a certain section of the community with characteristics and habits peculiar unto themselves.

In the absence of clear words to the contrary it cannot be said that it was the intention of the Legislature to bring coloured people as a class, within the provisions of the Native Administration Act. This conclusion is strengthened by the decision of the Natal Supreme Court in the recent case of Anderson vs. Green, 1932 N.P.D. 241 wherein the Court had occasion to define the status of one of the parties in the light of the definition of "Native" in the Native Lands Act of 1913 which is similar to that of "Native" in Act 38, 1927; in this case the learned Judges drew a distinction between "civil" status and "descent" and under the latter term laid down the tests of appearance and habits of life as being the true criteria of status for the purpose of the Native Lands Act. It is useful here to quote the following extract from the judgment of Hathorn, J.. "It appears to me that where membership of a tribe is referred to in close association with membership of a race as in the expression used in the definition, 'member of an aboriginal race or tribe of Africa', the membership of a tribe must, like the membership of a race be regarded as dependent primarily on descent and not on status." At page 253 of the same report, Lansdown, J. supports this view.

The cases of Govu vs. Stuart and Rex vs. Dunn are distinguished in the case of Anderson vs. Green.

In the above case (Anderson vs. Green) it is noteworthy that one of the statutes there considered is of a like nature to the Native Administration Act in that it deals with a branch of Native Administration, consequently the reasoning in Anderson's case applies with equal force to the case now before this Court.

It is perhaps advisable for future guidance to emphasize the order in which the three tests which have been mentioned should be applied and for this purpose I refer to the judgment of Kotze, A.J.P. in Rex vs. Auret at page 34, viz: "Now the tests which the Court generally applies in cases of this kind is not merely the general appearance of the person but (also) habits of life, because cases might occur where the appearance is deceptive and it is not a satisfactory test in every instance, consequently as I have said, the Courts have gone a step further and taken into consideration the habits of life of the person whose race or origin is in question. In the event of these tests failing the Courts have applied a third test viz. preponderance of blood."

The parties to this case are coloured people living according to European modes of life, therefore the test of preponderance of blood does not apply. The Native Commissioner applied the wrong test and the appeal should be sustained and the decision of the Native Commissioner set aside.

CASE.....

CASE NO. 11.

LYDIA MNYAPA D/A ISAAC MNYAPA VS. JOSEPH HLONGWANA.

PRETORIA. 19th May, 1933. Before Howard Rogers, Esq.,Acting President, Messrs. H.S. Fynn and J C. Yeats, Members of the Native Appeal Court (Transvaal and Natal Division).

Seduction - Paternity - Onus.

An appeal from the Court of the Native Commissioner, Germiston.

IN AN ACTION FOR DAMAGES FOR SEDUCTION AND FOR MAINTENANCE OF CHILD, IF PLAINTIFF HAS PROVED THAT SEXUAL INTERCOURSE TOOK PLACE, THE ONUS THEN RESTS UPON DEFENDANT TO SHOW THAT SHE WAS NOT A VIRGIN AT THE TIME OR THAT IT WAS PHYSICALLY IMPOSSIBLE FOR HIM TO BE THE FATHER OF PLAINTIFF'S CHILD

In this case the Appellant, Plaintiff in the Court below, sued the Respondent, Defendant in the Court below, for (a) the sum of £200 damages in respect of her alleged seduction in January, 1932, by the Defendant and (b) maintenance at the rate of £2 per mensem from the date of birth to the date of judgment in respect of a child born on the 15th September, 1932, as the result of the alleged seduction. According to "further particulars furnished by the Plaintiff at the request of the Defendant claim (a) included an amount of £10 in respect of lying-in expenses with necessary food and clothing, the balance being general damages.

Defendant's plea was in effect a general denial of the allegations upon which the claim was based.

The judgment of the Court below was one of absolution from the instance with costs.

The Native Commissioner was requested in terms of sub-section (1) of section three of the Native Appeal Courts' rules to furnish a written judgment showing (a) the facts the Court found to be proved, and (b) the reasons for the judgment of the Court.

The facts which the Court found to be proved were as follows:-

(a) During January, 1932, Plaintiff was living with her parents in quarters at the Glen Deep Gold Mine, Germiston.

(b) That Defendant, who is a married man, was also living on the premises with his wife in rooms adjacent to those occupied by Plaintiff and her parents and that friendly relations existed between the two families at the time.

(c) That shortly after 6th January, 1932, probably about 9th or 10th January, and during the absence of Defendant's wife carnal connection took place between Plaintiff and Defendant in the latter's room on the

premises.....

premises aforesaid.

(d) That Plaintiff gave birth to a child on the 15th September, 1932, and that a coloured woman named Kok, acting as midwife, was present at the birth.

(e) It was not until August, 1932, that Plaintiff made her condition known to her father when at the same time she indicated Defendant as being responsible.

(f) Defendant was brought before the Compound Manager, Glen Deep, and when confronted with Plaintiff denied that he was responsible for her condition.

The written judgment indicated that the Court while satisfied that carnal intercourse between the Plaintiff and Defendant did take place under the circumstances alleged was not able to come to any definite conclusion on the question as to whether the Plaintiff was a virgin at the time nor as to whether the Defendant was the father of the child. It was stated further in the judgment that "having regard to the number of days between date of probable gestation and date of birth, Plaintiff in order to succeed in her claim for maintenance should have established in evidence that her child was prematurely born. This she has failed to do. From the date given it is improbable that Defendant is the father of the child, and the Court therefore felt it would not be justified in finding for Plaintiff until evidence is forthcoming to show that the child, which was a 249 days baby, had been prematurely born."

Against this judgment an appeal was noted on the following grounds:-

1. That the judgment of the Native Commissioner absolving Defendant from the instance is against the weight of evidence in that on the admissible evidence on the record the Native Commissioner should have found for Plaintiff as prayed with costs.

2. Judgment is bad in law inasmuch as:

   (a) The Native Commissioner erred in holding that the onus lay upon plaintiff of showing that the child born was an abnormal or premature child.

   (b) The Native Commissioner erred in holding that the Plaintiff had to establish that she was a virgin at the time of the act of intercourse on the 9th or 10th January, 1932.

It was strongly urged by Mr. Advocate Oshrey on behalf of the Appellant and was not contested by Mr. Barrett for the Respondent that having regard to its findings as to the facts, the Court below should have entered judgment for the Plaintiff.

With this contention this Court is in entire agreement. In so far as the question of the Plaintiff's virginity at the time of the alleged seduction is concerned, it is common cause that she was unmarried and she must, as has repeatedly been laid down by our Courts, be presumed to have been a virgin in the absence of definite proof to the contrary, the onus of

which rested upon the Defendant. No such proof was adduced, the doubts which the Court entertained under that head being founded upon the fact that according to the evidence she showed no signs of having passed through any extraordinary ordeal when emerging from Plaintiff's room after her first experience of sexual intercourse and upon the use by her of a certain word (nor appearing on the record) which the Court was of opinion no girl of decent upbringing would use.

As to the question of paternity the law is equally clear. The fact of sexual intercourse between the Plaintiff and the Defendant having been established to the satisfaction of the Court, which accepted Plaintiff's evidence in this connection, the Native Commissioner, in the absence of any proof from the Defendant that under the circumstances it was physically impossible for him to be the father of Plaintiff's child, which proof was not forthcoming, erred in not accepting her statement as to paternity.

Mr. Barrett, on behalf of the Respondent, attacked the Native Commissioner's findings as to the facts as set forth in the written judgment and invited attention to certain discrepancies between the evidence of the Plaintiff and that of certain of her witnesses. He contended that the evidence for the Defendant should have been accepted by the Court in preference to that of the Plaintiff.

This Court, after full and careful consideration of the record, is not prepared to overrule the Native Commissioner's findings as to the facts and is of the opinion that Plaintiff's evidence is sufficiently corroborated to establish the alleged seduction.

The appeal is sustained with costs, the judgment of the Court below altered to one for Plaintiff with costs, and the case referred back to the Native Commissioner for the taking of such evidence as will enable him to assess the amount of damages and maintenance to be awarded to the Plaintiff.

CASE NO. 12.

IN RE ESTATE OF THE LATE ANNIE MZILIKAZI.

PRETORIA 19th May, 1933. Before Howard Rogers, Esq., Acting President, Messrs. H.S. Fynn and J.C. Yeats, Members of Native Appeal Court (Transvaal and Natal Division).

Succession - Illegitimate children of Native spinster.

An appeal from the Decision of the Assistant Native Commissioner, Johannesburg, in an enquiry held under section 3(2) of Government Notice No. 1664 of 1929.

IF A NATIVE SPINSTER HAS BEEN EXPELLED FROM AND REPUDIATED BY THE KRAAL TO WHICH SHE BELONGED, HER CONNECTION WITH THAT KRAAL IS ENTIRELY SEVERED AND SUCH SEVERANCE WOULD EXTEND TO RIGHTS OF SUCCESSION.

On the 14th February, 1933, an enquiry was held by the Assistant Native Commissioner, Johannesburg, under the provisions of sub-section (3) of section three of the regulations for the administration and distribution of Native estates, framed under sub-section (10) of section twenty-three of the Native Administration Act, 1927, and published under Government Notice No. 1664 of 1929, into a dispute which had arisen regarding the distribution of the property in the estate of the late Annie Mzilikazi.

At the enquiry Arthur Malima, the illegitimate son of the deceased, claimed to be her heir. He stated that he was a Fingo resident in the Bizana District; that his mother, who died in January, 1933, had never been married either civilly or by Native custom; that his mother had four brothers viz. Johan who had died without issue, Mhlambiso who had died leaving a son named Putse, Fesi who had died leaving two sons Fred and Mkwenkwe and lastly, Rolobile who had died without issue.

It is stated in the evidence that the deceased died leaving no will, and therefore it is clear that the estate must in terms of section twenty-three of the Act and the regulations framed thereunder devolve according to Native law and custom.

The finding of the Native Commissioner as the result of the enquiry was as follows:-

> It is ordered that Arthur Malima take possession of all the assets in the estate and look after them until such time as the Native Putse might claim them.

Against this finding an appeal was noted by Arthur Malima on the following grounds:

(1) That the decision is bad in law, and contrary to law.

(2) That the decision is contrary to the evidence and against the weight of evidence.

(3) That the said Arthur Malima is according to law and custom the rightful heir to the deceased's estate and property.

(4) That the learned Commissioner erred in coming to his decision before all the full facts were laid before him.

At the hearing of the appeal, Mr. Attorney Raaff on behalf of Putse Mzilikazi applied for and was granted leave to intervene as Respondent in the appeal.

Mr. Raaff on behalf of Putse took the preliminary point that the finding of the Native Commissioner was only in the nature of an interim order and was not a final decision and was therefore not appealable.

The Court was, however, unanimously of the opinion that the finding must be construed as a definite rejection of Arthur's claim to be the heir to the estate and as a pronouncement in favour of Putse. Indeed the reasons for his finding

submitted by the Assistant Native Commissioner permit of no other interpretation. Mr. Raaff's objection was accordingly overruled.

The only authority quoted by the Assistant Native Commissioner in support of his finding is the case of Nobulawa vs. Joyi (Whitfield, "South African Native Law", page 199). This case merely laid down that a Native spinster of full age was entitled to own in her personal right property she had earned. From this basis the Commissioner reasons as follows.-

".....This being the case, it also follows that she may devise such property at will, but in a case where a spinster dies intestate then obviously, on her death, the property ipso jure falls within the estate of her father or his heir.

"In the case quoted above, the intention is to safeguard the property of a spinster during her lifetime against the interference of her father or his heir, but unfortunately the decision does not go so far as to extend the concession to any illegitimate children the spinster might have borne. These children automatically become the 'property' of the mother's guardien and any property she might have owned suffer a similar fate. The maxim 'Een moder maakt geen bastard' does not apply to Native Law and the only remedy or right an illegitimate child might have is for maintenance out of the property his mother had left."

The Court is satisfied that the foregoing is not a complete nor an entirely accurate statement of the Native law on the subject of the succession rights of illegitimate sons of Native spinsters.

The general principle operative amongst most tribes is that the illegitimate son of a Native spinster becomes a "son" of the house to which such spinster belongs. Such son would, therefore, in the absence of any legitimate heir in that house, have the right to succeed to the property belonging to that house (and property acquired by a spinster would accrue to the house to which she belongs).

Further, if by virtue of her immoral conduct or for any other cause such Native spinster has been expelled from and repudiated by the kraal to which she belonged, her connection with that kraal would be entirely severed and such severance would extend to rights of succession. This Court is of the opinion that in such a case the deceased spinster should for succession purposes be regarded as having herself been a kraal head.

Having regard to all the circumstances of the case, it is considered that further evidence should be obtained on the following points:-

(1) Whether the father of the deceased is still alive.

(2) Whether the brothers referred to in the evidence belonged to the same "house" as the deceased.

(3) Whether the list of brothers appearing in the evidence, and of their issue, is exhaustive.

(4) Whether there was any repudiation of the deceased by her family.

(5) Whether the Appellant resided with the deceased during her life-time or was brought up by her family.

(6) Any other relevant evidence which may be tendered and does not already appear on the record of the proceedings.

The appeal is accordingly allowed and the Assistant Native Commissioner is instructed to re-open the enquiry, to take further evidence on the points enumerated above and to decide the issue in the light of such further evidence read with that already recorded.

The costs in both Courts are to form a charge against the estate.

CASE NO. 13.

SILO MDHLALOSE VS. MATSHWELANA NZUZA.

DURBAN. 10th July, 1933. Before Howard Rogers, Esq., Acting President, Messrs. E.W. Lowe and H.G. Arbuthnot, Members of the Native Appeal Court (Transvaal and Natal Division).

Extension of time within which to appeal - Just cause.

Application for extension of time within which to appeal from a judgment of the Court of the Native Commissioner, Eshowe.

TO RECOGNISE POVERTY OF ITSELF AS CONSTITUTING "JUST CAUSE" WOULD CREATE AN EXTREMELY DANGEROUS PRECEDENT AND WOULD ENTIRELY DEFEAT THE OBJECT OF THE RULE.

The Applicant, Silo Mdhlalose, sued the Respondent before Chief Gomonqo for eight head of cattle being the balance of lobolo which he alleged to be due to him in respect of a customary union entered into by Respondent with the woman Mahlambana of whom Applicant was guardian.

The Chief on the 27th August, 1931, gave judgment in favour of the Applicant for eight head of cattle as prayed.

This judgment was taken on appeal before the Court of the Native Commissioner, Eshowe, which ultimately on the 14th December, 1931, allowed the appeal and set aside the Chief's judgment with costs, in effect upholding a plea of res judicata advanced on the grounds that in decreeing a divorce between the Respondent and his wife in 1926, owing to the latter's misconduct, the Court had made an order for the return of five head of lobolo cattle by the Respondent to the Applicant in the event of the woman remarrying.

Application is now made by the Applicant, under Section six of the Native Appeal Courts rules promulgated under Government Notice No. 2254 of 1928, for an extension of time within which to note an appeal against the Native Commissioner's judgment dated the 14th December, 1931. This application is opposed by the Respondent.

In support of his application the Applicant submitted an affidavit dated the 20th July, 1932, alleging that though anxious to prosecute an appeal in the matter, he was unable previously to do so owing to lack of funds; that he was called upon to meet heavy commitments in December 1931, and subsequently owing to his mother's illness and also to the fact that he was called upon to support a large number of kraal inmates during a period of acute depression.

Section six of the Appeal Courts rules empowers this Court to extend in any case the period within which an appeal may be noted "upon just cause being shown."

What constitutes "just cause" was considered in the case Cairn's Trustees vs. Caarn (1912 A.D. 180) when it was pointed out that "it would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence" and that "all that can be said is that applicant must show something which entitles him to ask for indulgence of the Court. What that something is must be decided upon the circumstances of each case."

In the same case the Court went on to say:-

"The object of the rule is to put an end to litigation and to let parties know where they stand. It would be intolerable if there be no reasonable limit within which appeals might be brought and it is in the interest of the public that the time should be limited. When a party has obtained judgment in his favour and the time allowed by law for appealing has lapsed, he is in a very strong position and he should not be disturbed except under very special circumstances."

Again the Cape Provincial Division of the Supreme Court in the case Levenberg vs. Denholm (1930) enunciated as a general principle that the Court would be loth to grant an extension of time within which to note an appeal, while in Bhayla vs. Nunnerley & Co. Limited (1926 N.P.D. 491) Mr.Justice Tatham laid down that "where the right to defeat the successful litigant of the indefeasible character of his judgment has been lost through the fault of his adversary, the Court ought not to extend the time for appeal."

These authorities all point to the fact that the Court should not lightly or as a matter of course exercise the power vested in it under rule six but only with proper judicial discretion and under very special circumstances.

In the present case there is the bare allegation that the Applicant was anxious to prosecute an appeal but was without funds to enable him to do so within the time prescribed or for some considerable time thereafter owing to his domestic obligations during a period of severe depression. To recognise

poverty of itself as constituting "just cause" for the purposes of rule six would in the opinion of this Court create an extremely dangerous precedent, more particularly in cases in which the parties are Natives, who as a class are notoriously fond of litigation. To establish such a precedent would be entirely to defeat the object of the rule, would open the door to abuse, would protract litigation indefinitely and would, in short, give rise to an intolerable position.

Mr. Goldberg in argument for the Applicant relied upon the case Sitabataba Butelezi vs. Shadrack Butelezi (1930 2 N.A.C. (N. and T.) 156). The circumstances in that case were not, however, in the opinion of this Court on all fours with those in the present case.

It is not considered that good and sufficient grounds have been adduced by the Applicant to justify a departure from the ordinary rule and the application is accordingly refused with costs.

CASE NO. 14.

JOHANNES KESWA VS. MAFUSHANA MABANGA.

DURBAN. 10th July, 1933. Before Howard Rogers, Esq., Acting President, Messrs. E.W. Lowe and H.G. Arbuthnot, Members of Native Appeal Court (Transvaal and Natal Division).

Christian marriage - Unexempted Natives - Damages for adultery follow Native law - Cattle or money.

An appeal from the Court of the Native Commissioner, Nongoma.

AS PLAINTIFF WAS NOT EXEMPT FROM NATIVE LAW, ALTHOUGH HE WAS MARRIED ACCORDING TO CHRISTIAN RITES, HIS CLAIM FOR DAMAGES FOR ADULTERY, HAVING REGARD TO THE PROVISIONS OF SECTION 11 OF LAW NO. 46 OF 1887 AND OF SECTION 80 OF ACT NO. 48 OF 1898, MUST BE DEALT WITH UNDER NATIVE CUSTOM.

The Appellant was plaintiff in an action in the Court of the Native Commissioner, Nongoma, wherein he sued the Respondent for the sum of £15 by reason of Respondent's adultery with Appellant's wife Mahela, averring that as the result of such adultery Mahela had become pregnant.

The Respondent (Defendant in the Court below) pleaded that he was not indebted to the Appellant in the amount claimed. In the course of his evidence he admitted having committed adultery with the woman but stated that he did not know whether she was pregnant by him.

The Native Commissioner entered judgment in favour of the plaintiff for £8 and costs.

Against this judgment the Appellant lodged an appeal on the ground that the amount of £8 awarded to him as damages was insufficient.

The following is an excerpt from the Native Commissioner's reasons for judgment:-

"Defendant admitted his guilt, and left it to the Court to assess the damages. Plaintiff claimed £15, and was awarded £8.

"Defendant and Plaintiff's wife were charged with adultery shortly before the hearing of this case. They pleaded guilty and were punished. That case revealed that Plaintiff had been absent in Johannesburg for over a year, and that the adultery took place during his absence. Defendant made no attempt to deny his guilt, and but for his admission it might have been impossible to prove the case against him.

"I took into consideration the following circumstances:-

"(1) That Plaintiff's long absence from home would expose his wife to temptation.

"(2) That Defendant frankly admitted that he was responsible.

"(3) That Plaintiff has taken his wife back.

"The damages awarded the Plaintiff are sufficient to enable him to huy at least four to five good cows at the local sale yards. If £15 had been awarded him he could have bought at least eight cows. Damages amongst the Zulus are still reckoned in cattle. I did not consider it advisable to award damages which would have the effect of enriching the Plaintiff."

Neither party was represented by Counsel at the hearing of the appeal but both appeared in person.

It was contended by the Appellant that as he and his wife had been married by Christian rites the amount of £8 awarded as damages against Respondent by reason of his adultery with her was insufficient and that he was under the circumstances entitled to the full amount of £15 claimed in the summons.

The fact that the Appellant and his wife were married according to Christian rites does not appear in the evidence nor was evidence taken as to whether the Appellant was an exempted Native or not. It is necessary to comment on this omission as had the Appellant been an exempted Native married according to Christian rites these facts would have had a material bearing upon the measure of damages to be awarded which would then have fallen to be determined under the common law. As, however, the Appellant during the course of his argument admitted that he was not exempt from the operation of Native law, the fact that he was married according to Christian rites did not, having regard to the provisions of section eleven of Law No. 46 of 1887 and of section eighty of Act No. 48 of 1898, affect the issue.

The Court is satisfied that under Native custom the Appellant would be entitled to two or at the most three head of cattle as damages and as damages were claimed in money and not

in cattle, it is not prepared, having regard to the Native Commissioner's remarks in his reasons for judgment in reference to the monetary value of cattle in the Nongoma district, to increase the amount awarded to the Plaintiff in the Court below.

We feel constrained to point out, however, that from his reasons for judgment it is clear that the Native Commissioner in deciding this case allowed himself to be influenced by considerations which did not emerge from the record but came to his knowledge during the hearing of the previous trial of the Defendant on the adultery charge, the record of which proceedings was, of course, not before him when dealing with the civil claim for damages.

The appeal is dismissed with costs.

CASE NO. 15.

NONDWAYISA TSHEZI VS. JOSIAH MAPANGA.

DURBAN. 12th July, 1933. Before Howard Rogers, Esq., Acting President, Messrs. E.W. Lowe and H.G. Arbuthnot, Members of Native Appeal Court (Transvaal and Natal Division).

Adultery - Damages - Section 209 - Natal Native Code of 1891.

An Appeal from the Court of the Native Commissioner, Bulwer.

SECTION 209 OF THE CODE OF 1891, BY IMPLICATION, PRECLUDES THE GRANT OF DAMAGES TO A HUSBAND FOR ADULTERY WITH HIS WIFE IF THE ACT TOOKPLACE WHEN THEY WERE LIVING APART AND IF ADULTERY OCCURRED WHILE THIS CODE WAS STILL IN FORCE.

In October, 1932, the Respondent had obtained a divorce from his wife, to whom he had been married under Christian rites. Thereafter he sued Appellant for damages for adultery with his wife, claiming £25 as damages for adultery and £33.8.0 special damages for costs incurred in the action for divorce from his wife.

The Native Commissioner found that Appellant was the man with whom Respondent's wife had committed adultery and gave judgment for £10 general damages and £26.10.0 for special damages and costs.

The Appellant now appeals against this judgment.

It appears to be common cause between the parties that the Respondent is not an exempted Native. His claim therefore falls to be dealt with under Native Law and the provisions of the Code of 1891, the alleged adultery having been committed before the promulgation of the New Code.

Section two hundred and nine of the Code of 1891 lays down that any Native Committing adultery with a married woman living with her husband shall be liable in damages to

the injured husband.

In the case of Michael Caluza vs. Mpini (1901 N.H.C. page 81) the provisions of this section were considered and the Court decided that by implication they preclude the grant of damages to a husband for adultery with his wife if the act takes place when they are living apart. With this view this Court agrees.

It was strongly urged by Mr. Shepstone for the Respondent that the decision given by this Court on the 23rd January 1932 in the case "Falaza Mkize vs. Mkwebu Tusi" (1932 Prentice-Hall (N.A.C.- N. & T.) R.7) should be followed in the present case.

In our opinion, however, thecases are by no means analogous. In "Falaza Mkise vs. Mkwebu" it was held that the Plaintiff, a Leper, was entitled to recover damages from a person who committed adultery with his wife during a period when he was detained at a Leper Institution, the view of the Court being that the circumstances were such that there was no intention in this enforced separation that the true relationship between the Plaintiff and his wife should be broken.

In the present case, however, it is disclosed in the evidence that Respondent's wife deserted him in March, 1930, and has not since lived with him. The adultery is alleged to have taken place some months after March, 1930. It is abundantly clear, therefore, that the woman was deliberately living apart from her husband at the time when the adultery is alleged to have been committed. This Court is accordingly of the opinion that the provisions of section two hundred and nine of the Code of 1891, as interpreted in the case "Michael Caluza vs. Mpini" referred to above, apply and that the husband is not entitled to damages.

The appeal is upheld and the judgment of the lower Court altered to one for Defendant with costs. Respondent is to pay the Costs of the appeal.

Appellant asks for costs on the higher scale.Counsel appeared twice in argument before the Court, the second appearance being on the motion of the Court itself. Under the circumstances the fee for Counsel's appearance will be allowed at the maximum of the scale.

CASE NO. 16.

TIMOTHY KANYILE VS. NONJINAYISI MTSHENGU.

PIETERMARITZBURG. 17th July, 1933. Before Howard Rogers, Esq., Acting President, Messrs. E.J. Lowe and H.G. Arbuthnot, Members of the Native Appeal Court (Transvaal and Natal Division).

Noting of appeal - Computation of period allowed.

SUNDAYS AND PUBLIC HOLIDAYS ARE NOT EXCLUDED IN COMPUTING THE PERIOD OF TWENTY-ONE DAYS PRESCRIBED UNDER RULE SIX OF THE NATIVE APPEAL COURT RULES EXCEPT WHEN THE LAST DAY OF SUCH A PERIOD FALLS ON A SUNDAY OR PUBLIC HOLIDAY.

This matter came before the Court in the shape of an application, under section thirteen of the rules for Native Appeal Courts published under Government Notice No. 2254 of 1928 for leave to prosecute an appeal which had been noted on the 12th May, 1932, but which for reasons specified in an affidavit filed by the late Mr. D.W. Wilson, who during his life-time practised as a solicitor under the style of Arthur Hime & Co., had not been prosecuted at the ensuing session of the Court.

It was alleged in the affidavit that the necessary security had been lodged in terms of sub-section (3) of section eight of the rules and in support of the application was filed the written consent of the solicitor of record for the respondent agreeing to the prosecution of the appeal as prayed.

The facts were briefly that in an interpleader action the Applicant, Timothy Kanyile, had applied for the release of certain donkey stallions attached on behalf of Respondent under a writ of execution issued in pursuance of an action between her and Mini Kanyile, Claimant's uncle, which stallions he claimed to be his own property.

In this interpleader action the following judgment was recorded on the 19th April, 1932, by the Additional Native Commissioner, Pietermaritzburg.-

"Attachment to stand, with costs."

Against this judgment an appeal was noted by the Applicant on the 12th May, 1932, but was not prosecuted in terms of the rules owing, firstly, to the default of a Native Clerk employed by Wilson, and secondly, to the fact that the Clerk of the Additional Native Commissioner's Court failed to comply with the requirements of sections fourteen and sixteen of the rules.

This Court has already had occasion in the case "Bhekizulu Tshange vs. Sazana Bhengu" to comment upon the negligence of the Clerk of this particular Court in failing to fulfil his duties under the rules.

When the matter came before it, the Court pointed out that a serious difficulty lay in the fact that the notice of appeal in the first instance was not lodged within the period of twenty-one days prescribed under section six of the rules.

Mr. Hodson, for the Applicant, urged that having regard to the decision of this Court in the case "Elias Motsoeneng vs. Paul Thomas Tusi" (1933 Prentice-Hall R.17) the notice of appeal lodged on the 12th May, 1932, must be regarded as timeous.

In the case referred to the Court in deciding that the appeal had been timeous held that: although the rules of

the Native Appeal Court were silent upon the point, it was proper to follow Order I, Rule (3) (2) under the Magistrate's Courts Act and to lay down for future guidance that Sundays and Public Holidays should be excluded when computing the number of days within which an appeal must be noted in the Native Appeal Court.

The issue had previously been raised before the Native Appeal Court of the Cape and Orange Free State Provinces in the case "Jarana Mehlowana vs. Lundwendwe Jarana and Another" (1929: 1 N.A.C. page 26) which, having regard to the provisions of section five of the Interpretation Act, No. 5 of 1910, laid down that Sundays and Public Holidays are not excluded in computing the period of twenty-one days prescribed under Rule six, except when the last day of such a period falls on a Sunday or Public Holiday in which case that day is excluded.

Apparently when the case Elias Motsoeneng vs. Paul Thomas Tusi was under consideration the attention of the Court was not directed either to section five of the Interpretation Act or to the previous decision of the Cape and Orange Free State Native Appeal Court referred to above.

As the Rule is silent upon the point as to whether Sundays and Public Holidays are to be excluded in computing the prescribed period of twenty-one days, the question must necessarily be determined in accordance with section five of the Interpretation Act, the terms of which are clear and unequivocal, and there is no authority or necessity for the purpose of interpreting the Rule to have recourse to an Order which was framed specifically for Magistrate's Courts and has no application either to Native Commissioner's Courts or to this Court.

We are accordingly not prepared to follow the decision in the case "Elias Motsoeneng vs. Paul Thomas Tusi" and are of the opinion that the decision of our sister Court in the case "Jarana Mehlowana vs. Lundwendwe Jarana and Another" was correct.

The appeal must accordingly be regarded as not having been timeously noted, but, in view of the special circumstances of the case and the fact that there was no objection on the part of the respondent, the Court condoned the irregularity under the powers vested in it by Rule six.

The Court likewise, having regard to the facts that the circumstances disclosed in Mr. Wilson's affidavit were exceptional, that the Clerk of the Additional Native Commissioner's Court had failed to comply with Rules fourteen and sixteen and that Respondent's written consent had been filed, condoned in terms of Rule thirteen the failure of the Applicant to prosecute the appeal at its next ensuing session and proceeded to hear the appeal.

It must be emphasised, however, that the Court will not for the future grant indulgences of this nature as a matter of course or merely by reason of the consent of the parties, that it looks for strict compliance with its rules and that it will not lightly condone any breach thereof.

The question at issue in the Court below was entirely one of fact, viz. whether the donkey stallions in question were or were not the property of the claimant.

These interpleader actions are exceedingly common amongst Natives who, taking advantage of the recognition of the "sisa" custom frequently attempt to defeat the rights of judgment creditors by alleging that attached stock have been sisa-ed with the judgment creditor or endeavour to establish constructive possession in some other form.

Such claims must necessarily be subjected to the closest scrutiny, and, in the opinion of this Court, should be rejected unless clearly established by convincing evidence, bearing in mind that from the very nature of things the judgment creditor is at a great disadvantage in these interpleader actions in that he is frequently not in a position to lead rebutting evidence.

It was no doubt in recognition of this fact that it was laid down by the Supreme Court in reference to interpleader actions that, if the Court does not believe the evidence of the claimant, it is justified in declaring the property executable even though the judgment creditor lead no evidence (Sibaca vs. Myburgh, 1917 E.D.L. 1).

In the present case the Additional Native Commissioner found the evidence of the claimant and of his uncle, the judgment debtor, entirely unconvincing and, on the grounds specified in his reasons for judgment, came to the conclusion that the allegation that the donkeys had been sold to the claimant was unfounded and had been put forward in a fraudulent attempt to defeat the judgment creditor's just rights.

After hearing Counsel in argument and carefully considering the record this Court sees no reason to differ from the Additional Native Commissioner's finding and the appeal is accordingly dismissed with costs.

CASE NO. 17.

MUKWA MKONZA VS. ESTHER MKALIPI.

PIETERMARITZBURG. 20th October, 1933. Before H.C. Lugg, Esq., Acting President, Messrs. J. Addison and W.G. Stafford, Members of the Native Appeal Court (Transvaal and Natal Division.)

Customary union - Divorce - Section 78(1) - Natal Native Code.

An appeal from the Court of the Native Commissioner, Newcastle.

SECTION 78(1) OF THE NATAL NATIVE CODE IS IMPERATIVE AND MUST BE COMPLIED WITH BEFORE A DIVORCE CAN BE GRANTED.

Respondent....

Respondent sued her husband the Appellant, for a divorce on the grounds of gross cruelty and illtreatment. The parties were married by Native custom in terms of the provisions of the Native Code of 1891 which has since been repealed by the New Code.

The Native Commissioner found in Respondent's favour and made the following order:-

> Order for divorce granted. Plaintiff to return to the care of her guardian Simayedwa Mkalipi, and to have the children of the marriage. Further ordered that there be no return of the lobolo cattle. Plaintiff to have costs of the action.

This Court suo motu drew attention to the fact that there was no evidence on the record of an attempt at reconciliation in terms of section 78(1) of the New Code. Counsel for Respondent has argued that the fact that the step-father did on various occasions return the wife to her husband is sufficient compliance with the section. He argues further that section 78(1) is merely directory, not imperative. The corresponding section (186) of the old Code specifically states "proof of such attempts at reconciliation must be given to the Court before divorce can be granted." Section 78(1) contains no such provision.

This Court is of opinion that section 78(1) is imperative and must be complied with before a divorce can be granted. It is in our opinion not sufficient to shew that the father merely returned the woman to her husband. The section contemplates a definite attempt at reconciliation by the father or protector. The intention of the section appears to be that such an attempt should be made in contemplation of and as a preliminary to the application for a divorce. The portion of the section dealing with the matter reads. ".....and upon her declaring her refusal to live with her husband, and her intention to seek divorce her father or protector shall as soon as practicable attempt to reconcile the partners and should he fail to effect a reconciliation he shall accompany the wife to the Court of the Native Commissioner to institute proceedings for a divorce."

Section 78(2) further provides that the Court of Native Commissioner may in certain circumstances appoint a curator ad litem "and the person so appointed shall act in accordance with sub-section (1)". In our opinion such attempt would normally take the form of a preliminary enquiry by the father or protector in the presence of the parties and in this case what was done is not sufficient to constitute compliance with the terms of the section.

One of the grounds of appeal is that the case has been wrongly brought under the amended Code, as the grounds on which the divorce was applied for arose before the amended Code came into operation.

Counsel for Appellant has argued that in view of section 13(2)(c) of the Interpretation Act 5 of 1910, Appellant acquired certain rights under the old Code, and the action should be brought under that Code, the requirements of which

should be complied with. On this point the Court holds that the question is entirely one of procedure and not one of vested rights acquired under the repealed enactments and that the procedure under the New Code must be followed in seeking relief.

A further ground is that the Native Commissioner had no jurisdiction to try a divorce action, it being contended that as the parties were married under the old Code their union is not a "customary union" but a marriage and that jurisdiction is excluded by section 10 of the Native Administration Act. The definition of "customary union" given in section 35 of the Native Administration Act reads: "Customary union" means the association of a man and a woman in a conjugal relationship according to Native law and custom, where neither the man nor the woman is party to a subsisting marriage."

Marriage is also defined and specifically excludes any union contracted under Native law and custom, or any union recognised as a marriage in Native law under the provisions of section 147 of the old Code.

It is clear, therefore, that however designated, both a native marriage under the repealed Code and a customary union under the Native Administration Act and the New Code, fall within the definition of "customary union" and as such are not excluded from the jurisdiction of the Native Commissioner's Court by section 10 of the Act.

In addition to the absence of proof of an attempted reconciliation the Court must draw attention to the following irregularities which appear from the record.-

1. No evidence was taken from the Defendant (Appellant). The Native Commissioner has merely recorded a statement made by him, apparently given in the form of an address, and not under oath. Section 3 of the Rules for Native Commissioner's Courts published by Government Notice No. 2253 of 1928 reads: "All oral evidence shall be given after the witness has been duly sworn or admonished to speak the truth."

   Although the Appellant could not be compelled to give evidence, the Native Commissioner should state on his record whether he was afforded an opportunity to do so. Unless a witness has been sworn his statement is not evidence and should not be recorded. He may of course address the Court after the proceedings have been closed. Further, the record is silent as to whether Defendant was given an opportunity of calling evidence, and does not state that he had closed his case.

2. No evidence has been tendered in regard to the number of cattle paid as lobolo although the marriage certificate which was put in shows that eleven head were delivered. It is essential to lead evidence in regard to the number of cattle to be returned in the event of a divorce being granted (Zalukazi vs. Mtwazi 1904 N.H.C. 45).

3. A document purporting to be a pass granted to Appellant to proceed in search of his wife is attached to the record, but is not referred to in the evidence.

4. The order made does not comply fully with section 83 of the Code.

The attention of the Native Commissioner is also drawn to sections 81 and 82 of the Code.

In the circumstances the appeal will be sustained and the case remitted for further hearing and determination on the several points raised. Each party to be afforded an opportunity of calling further evidence. The evidence already recorded to form part of the record.

As Appellant has failed on all the grounds contained in the writ of appeal and has only succeeded on those raised by this Court, costs of this appeal will be made costs in the cause before the Native Commissioner's Court.

CASE NO. 18.

MTIMKULU CELE N.C. VS. ISIAH SHEMBE.

PIETERMARITZBURG. 20th October, 1933. Before H.C. Lugg, Esq., Acting President, Messrs. J. Addison and W.G. Stafford, Members of the Native Appeal Court (Transvaal and Natal Division).

Purchase and sale - Agency - Section 72, Act 29/1926.

An appeal from the Court of the Additional Native Commissioner, Pietermaritzburg.

WHEN THE PURCHASER OF IMMOVABLE PROPERTY HAS PAID ALL BUT A SMALL BALANCE OF THE PURCHASE PRICE, THE PROVISIONS OF SECTION 72 OF ACT 29 OF 1926 APPLY.

The Plaintiff (Respondent) is a preacher living near Phoenix, Natal, and Defendant (Appellant) is the Executor in the Estate of the late Charles Cele.

The late Charles Cele purchased a property described as Lots 23 and 24 of A of 3 of the farm Piezang River, six acres in extent, situated at Inanda, from one Elka M. Cele, but before transfer had actually been passed to him he sold it to the present Plaintiff for £77.6.0. This occurred on 25/7/1929, and the terms of the transaction are embodied in an Agreement of Purchase and Sale which has been filed of record. Clause 8 of this agreement contains the usual provision for cancellation in the event of Plaintiff's failure to implement the agreement.

Mr. Attorney G. Ray Burne acted for Elka Cele in the first transaction, and arising out of it was a claim for £9 which he had against Charles Cele for work done.

According.....

According to the evidence of Plaintiff it would appear that when Charles Cele agreed to sell the land to him, Cele suggested that they should go to Mr. Burne to have the agreement committed to writing as the latter had all the papers in connection with the first sale; Plaintiff, however, preferred Mr. McKenzie and they went to him the next day and he drew up the agreement. Amongst other things this agreement provided that all instalments were to be paid "to the Seller at his address at Inanda Mission Station, District of Indwedwe, P.O. Phoenix, or such other address as the Seller may in writing appoint", and it is necessary to stress the importance of this clause.

Plaintiff tells us that he had paid all the instalments except an amount of £12.3.10 which fell due on the 31/10/1930, and that all these were paid by him to the Seller personally. Two months before the last instalment fell due he sent the amount to Mr. Attorney Burne because the Seller had removed to Pietermaritzburg and his exact whereabouts were not known. Plaintiff appears to have acted in this way on the assumption that because Burne was in possession of certain of Charles Cele's (Seller's) papers in regard to the purchase from Elka M. Cele, he was Charles Cele's agent also.

Mr. Burne states that when this payment was made to him, as it was on the 28/8/30, he immediately wrote to Charles Cele and apprised him of the fact asking him to sign certain documents in order to effect transfer, and intimating that he would be deducting £9 from the £12.3.10 in settlement of what was due to him, but got no reply. He wrote again on the 15th of the following month and then received a letter from Mr. Attorney D'Alton informing him that his client, Charles Cele, declined to sign any documents until the full amount due by Plaintiff to him had been paid to him direct, and that he further challenged Mr. Burne's right to retain the £12.3.10 received from Plaintiff. To this letter Mr. Burne made no reply but retained the £12.3.10 as he says, in trust, because he had been engaged to put through the first transaction for Elka Cele and the transfer from Charles Cele to Plaintiff. He admits that he received no specific instructions from Charles Cele to collect money for him, but considered that he was acting for both him and Plaintiff.

Charles Cele died in November, 1930, and then the correspondence was revived by the widow and the Executor who adopted the same attitude as deceased had done.

Finally as Mr. Burne would not comply with the request contained in Mr. D'Alton's letter, the Executor's (Defendant's) solicitors wrote cancelling the sale.

After a careful perusal of the evidence I can find nothing to show that after the parties had agreed on the purchase and sale of this property and had committed their agreement to writing before Mr. McKenzie, Charles Cele in any way associated himself with Mr. Attorney Burne. All I can do, as Plaintiff appears to have done, is to infer that because Burne had been concerned in the previous transaction between the Celes in respect of which there was a claim against Charles Cele for £9, and because Charles Cele suggested that they should go

to ....

to Burne to draw up the agreement as he still held some of the papers, that therefore Burne should be regarded as his agent for the purpose of receiving the last payment. This, however, is insufficient to constitute agency.

The manner in which payments were to be made is explicitly set out in the agreement; the parties observed these conditions to the letter in respect of all but the last payment; and when deceased found that Burne had received this, he immediately challenged his right to retain it - a safe inference that he also challenged his right to receive it, and there were good reasons why he should avoid Burne. The latter had a claim against him, and there were also collection charges to be avoided by receiving the amount direct from Plaintiff.

As Plaintiff has failed to establish that Burne was Charles Cele's agent - a fact which he should have satisfied himself about before making payment in conflict with the written agreement - Defendant was entitled to cancel the sale, but as it is now provided by Section 72 of Act 29, 1926, that a purchaser by instalments of immovable property who has paid more than fifty per cent of the purchase price shall be entitled to demand from the vendor, transfer of the property on condition that, simultaneously with its registration, a first mortgage bond shall be passed in favour of the vendor to secure the balance of the purchase price, it is necessary to consider whether this section is applicable to the present case.

The point was raised suo motu by the Court.

It is admitted by Counsel for both parties that this section of the Act is not restricted to cases of insolvency, but Mr. Von Gerard contends that as Plaintiff's alleged tender of the balance amounted to no tender at all, he could not avail himself of the section; he had not complied with the reciprocal obligation imposed by the section, and had not sought in his pleadings - or subsequently - to avail himself of it.

We cannot, however, close our eyes to the fact that Respondent had paid all but a small balance of the purchase price; that this balance is available to complete the payment; that the parties are Natives and that to recognise cancellation of the sale would result in a grave injustice. Furthermore it seems to us that as the enactment in question was introduced in order, as the title of the Act sets out, "To amend the Insolvency Act (Act 32, 1916) in certain respects, and to enact certain provisions for the relief of debtors with a view to preventing insolvencies", that section 72 was inserted to meet cases of this very nature. It also seems to be an instance in which we should invoke the wide powers conferred upon this Court by section 15 of the Native Administration Act.

In the circumstances the order made by the Native Commissioner although founded on wrong premises, will be allowed to stand with effect from today.

During argument the question was raised as to whether it was competent for a Native Commissioner's Court to grant an order for specific performance without an alternative of damages

but as section 10 of the Native Administration Act, unlike section 44(2)(c) of the Magistrate's Courts Act, contains no such exclusionary rule, we must hold that he can.

The appeal will accordingly be dismissed but there will be no order as to costs.

CASE NO. 19.

KISHWAYISE MKIZE VS. ZIKONELA NTULI.

DURBAN. 27th October 1933. Before H.C. Lugg, Esq., Acting President, Messrs. J. Addison and W.G. Stafford, Members of the Native Appeal Court (Transvaal and Natal Division).

Customary union - Automatic divorce de facto remarriage - Section 51(3) Natal Native Code.

An appeal from the Court of the Native Commissioner, Eshowe.

AMONGST THE NATIVES OF ZULULAND NO SPECIAL CEREMONY IS ASSOCIATED WITH THE MARRIAGE OF A WIDOW OR DIVORCED WOMAN.

Appellant is the recognised son and general heir of the late Mbulelwa Mkize. The latter married a woman named Nzayimbi according to Native custom, and then during the Anglo Boer War he disappeared and has not been heard of since. No children of this union survive.

Shortly before the Bambata Rebellion in 1906 Nzayimbi was taken over by Mbambo Ntuli and the two lived together as man and wife until the death of Mbambo at the beginning of the Great War. By then she had borne Respondent and three daughters to Mbambo.

After Mbambo's death his brother Ngazana assumed guardianship over Nzayimbi and her children. The mother died after the Great War but her children have continued to live under the care of Ngazana up to the present time.

In 1931 the present Appellant sued Ngazana before his Chief for the property rights in the four children and was awarded a judgment in full. Under it twelve head of cattle were subsequently attached. These had been received as lobolo for one of the daughters.

This judgment still stands. Respondent has since, however, claiming as heir to his late father Mbambo, instituted an action before the Assistant Native Commissioner, Eshowe, against Appellant for the recovery of these cattle and has been awarded a judgment declaring him heir and entitled to the cattle.

The whole issue turns on the question as to whether the union between Mbambo and Nzayimbi was a legal one or not.

Mr. Gabriel has urged that the union was not a legal one and the proper remedy was for Respondent to have interpleaded and applied for a release of the cattle before the Chief's Court.

As regards the union, the Native Commissioner found as a fact that it did constitute a de facto Native marriage and with this view we agree.

There is evidence that some lobolo was paid, although the exact number is in dispute; the fact that the parties lived together as man and wife continuously for ten years or more, and that soon after Mbambo's death and up to the present - a period of something like twenty-three years - the children are still to be found in the custody of Mbambo's heir, are factors which seem to indicate conclusively that the parties were married.

Section 57(3) of the New Code was without doubt framed for the purpose of meeting a case of this kind, and under its provisions the validity of a union in Zululand depends entirely on its being recognised as such by Native law and custom. Before the introduction of the statutory enactment the circumstances disclosed would have been tantamount to a divorce from the first husband and a remarriage to the second.

Even had no lobolo been paid I should have been prepared to hold that there had been sufficient acquiescence by those primarily concerned with the woman's custody to imply consent to the union in this case. It is wellknown that amongst the Natives of Zululand no special ceremony is associated with the marriage of a widow or divorced woman, and it is still open to Appellant to sue for whatever lobolo may still be due to his father's estate in respect of Respondent's late mother.

On the second point raised by Mr. Gabriel all I wish to say is that Respondent could not interplead as this would have signified his acquiescence in a judgment in an action to which he was not a party. He was attacking Appellant's rights to succeed to this estate as a whole, and the only way of dealing with the matter was by taking the action he did. By doing so he attacked the validity of the Chief's judgment as a whole.

The appeal will be dismissed with costs.

CASE NO. 20.

NOBUBI ZAMA D/A VS. NDOSI ZUNGU.

DURBAN. 30th October, 1933. Before H.C. Lugg, Esq., Acting President, Messrs. J. Addison and W.G. Stafford, Members of the Native Appeal Court (Transvaal and Natal Division).

Isangoma ceremony - illegal acts.

An appeal from the Court of the Native Commissioner, Ndwedwe.

AS BOTH APPELLANT AND RESPONDENT WERE PARTIES TO ACTS PROHIBITED BY SECTION 129(1) OF THE CODE, IT IS NOT COMPETENT FOR EITHER TO INVOKE THE AID OF THE COURT TO ENFORCE ANY CLAIM ARISING THEREFROM.

It is admitted by Respondent (Plaintiff in the Chief's Court) that his wife is now an isangoma; that Appellant is also an isangoma and that his claim against Appellant arose in connection with certain treatment which his wife received from her during her initiation period (ukwetwasa).

Respondent's wife had spent a period of some fifteen months at the kraal of Appellant as a novitiate for which the latter received certain payments. On her return to her husband's kraal Appellant accompanied her, and directed that as a final act of purification (ukupotula) the slaughter of a goat should be made. This was done, but being dissatisfied with the size of a beast which was then offered her by Respondent in payment of her services, she refused to proceed with the ceremony and left the kraal.

Respondent and his family thereafter consumed the goat and clothed his wife in its skin, but nevertheless regarded its slaughter in the circumstances as a wasted effort, and Appellant's conduct as insulting. He sued her before the Chief for the replacement of this goat and was awarded a judgment for such an animal with costs. This judgment was subsequently confirmed by the Native Commissioner on appeal and is now before us for final review.

An isangoma's calling may include much which is unlawful or illegal e.g. smelling out, but she also frequently prescribes propitiatory offerings to the ancestral spirits in the shape of goats or cattle for sacrificial slaughter in case of sickness - offerings which have a purely religious significance and are quite harmless in their way. If licenced to practise as a medicine woman the fact of her being an acknowledged isangoma would not of itself preclude her from practising as an inyanga yokulapa, but in this instance the acts which give rise to the claim were associated with the initiation of an isangoma, and clearly include what was the intention of the legislature to prohibit.

We have unanimously come to the conclusion that as both Appellant and Respondent were parties to such acts - contemplated and prohibited by section 129(1) of the Code - it is not competent for either to invoke the aid of our Courts to enforce any claim arising therefrom.

The judgment of the Native Commissioner will accordingly be set aside and the appeal sustained with costs in all Courts.

CASE NO. 21.

ABIYA MOTSEPE VS. GEORGE MAKAPAN, N.C.

PRETORIA. 11th December, 1935. Before F.N. Brownlee, Esq., President, Messrs. F.H. Ferreira and J.C. Yeats, Members of the Native Appeal Court (Transvaal and Natal Division).

Municipal .....

Municipal location - Occupation of stand equivalent to lease - Right to cede.

An appeal from the Court of the Additional Native Commissioner, Pretoria.

THE RIGHT TO BE GRANTED A PERMIT TO OCCUPY A STAND IS A PERSONAL ONE BUT, HAVING BEEN ACQUIRED, SUCH RIGHT MAY BE DISPOSED OF TO ANOTHER, PROVIDED THAT THE DULY PROMULGATED REGULATIONS IN FORCE AT THE TIME ARE COMPLIED WITH.

In the Court below the Respondent in his capacity as executor in the deceased estate of one Ninevah Makapan sued the present Appellant for the cession of the lease of a stand in the municipal location of New Marabastad, Pretoria, alleging a verbal agreement of sale of the stand and buildings thereon between the late Ninevah and Appellant and tendering the sum of £25 as balance of the purchase price. An undertaking by the Pretoria City Council as lessors to transfer the lease of the stand to Respondent if he succeeded in the action was also put in.

The Native Commissioner after a lengthy hearing gave judgment for the Plaintiff and ordered a cession of the lease to be made over to him. Against this order Defendant appealed on the grounds, inter alia, that it was bad in law and against the weight of evidence, the latter ground being abandoned by Counsel in this Court. Before argument the point that the summons was excipiable was raised by Mr. Advocate Gould for Appellant, who submitted that although the point had not been raised in the Court below, it could be taken for the first time on appeal and quoted the Appellate Division case of Fripp vs. Gibbon, 1913 - wherein it was held to be competent to take a new point in appeal - in support of his contention. The Court concurred.

In argument Mr. Gould contended that the right to be granted a site permit in municipal locations was purely personal, that such a right is governed by the regulations applying to the location in question and not by common law principles, and that as a municipality does not grant the lease of a stand, the Appellant could not give a cession thereof, since his right is simply one of occupation. Furthermore, as such right of occupation is purely personal the maxim "actio personalis moritur cum persona" should apply.

By leave of the Court, the Location Regulations for the Municipality of Pretoria were put in by Mr. Gould, who quoted as his authority for so doing the case of Jozane vs. Brakpan Municipality 1929 T.P.D. 736, Respondent offering no objection.

For Respondent Mr. Weavind argued that however described, the right of occupation which the Appellant enjoyed amounted to a lease and could therefore be ceded.

After careful consideration of the points raised by Counsel and the arguments on behalf of the parties, this Court comes to the conclusion that the rights of Natives to occupation of stands in the Municipal Native Location are governed by the regulations in force, but that this fact does not deprive

them.....

them of such common law rights as they may possess in that regard.

Respondent could not apply for the site permit until he was the cessionary of the particular stand. If he were then refused the right to occupy on the personal ground that he was an unfit or undesirable person, he had recourse to the Courts.

It is clear that the right to be granted a permit to occupy a stand is a personal one, but this Court holds that having been acquired, such right may be disposed of to another, provided that the duly promulgated regulations in force at the time are complied with, and since it is admitted that consent to the cession had been granted by the Superintendent it must be held that the Respondent is entitled to the same.

The use in the regulations of the terms "sublet", "payment of rent" and the like tends to shew that tenure of stands in the Municipal Location is a species of lease, and while conditions differ in certain respects from those applying to leases as known in common law, yet it must be held that to all intents and purposes the right to occupy a site is in its essentials, a lease. It appears that not only the law but also the equities in the matter are with the Respondent and the appeal will therefore be dismissed with costs. The judgment in the Court below is amplified by the insertion between the words "Ninevah Makapan" and the word "is" in the third line, of the words "upon payment of the sum of £25 as tendered."

CASE NO. 22.

CHIDI LEKOLOANE VS. SAMPSON TSWANE.

PRETORIA. 13th December, 1933. Before Howard Rogers, Esq., Acting President, Messrs. F.H. Ferreira and J.C. Yeats, Members of the Native Appeal Court (Transvaal and Natal Division).

Unlawful impounding of cattle - Damages - Onus - Transvaal Pounds Ordinance No. 7 of 1913 as amended.

An appeal from the Court of the Additional Native Commissioner, Pietersburg.

A PLAINTIFF CLAIMING DAMAGES FOR UNLAWFUL IMPOUNDING OF STOCK MUST SHOW EITHER THAT THE IMPOUNDING WAS WRONGFUL AND UNLAWFUL OR THAT HE TENDERED PAYMENT OF TRESPASS FEES, IN ADDITION TO COMPENSATION FOR ANY DAMAGE, BEFORE REMOVAL OF STOCK TO POUND.

In this matter the Respondent, as Plaintiff in the Court below sued the Appellant, as Defendant, for the sum of £25 as damages by reason of the alleged unlawful impounding by Appellant of certain thirty-nine head of cattle belonging to Respondent.

When the Plaintiff closed his case in the Court below Defendant's attorney applied for a judgment of absolution from the instance. This application was opposed by Plaintiff's

attorney.....

attorney and refused by the Court. Defendant's attorney then closed his case without calling any evidence.

The following entry was thereupon made on the record by the judicial officer concerned:-

"The Court finds that the Plaintiff's cattle were unjustifiably impounded by the Defendant. That they did no damage and that they could have been returned to Plaintiff without taking them to the Pound. Plaintiff has by Defendant's action suffered loss of three oxen taken in payment of the pound fees and is entitled to recover the oxen.

"Mr. Roos asked for judgment for the £4.10.3d. and costs of the case. This was granted."

Judgment was accordingly entered for the Plaintiff for the sum of £4.10.3d. with costs.

(Here it may be mentioned that the sum of £4.10.3d. was the amount which the Poundmaster demanded from the Plaintiff before he would liberate the cattle. The Plaintiff was unable to pay the amount in cash and accordingly three head of cattle were retained by the Poundmaster in respect thereof).

Against this judgment an appeal was noted on the ground that it was against the weight of evidence and was bad in law in that:-

(a) Plaintiff failed to prove that the alleged impounding was wrongful and unlawful; and

(b) Plaintiff failed to prove any damages.

The facts of the case as they emerge from the record are as follows:-

On the 18th August, 1933, the Defendant in the Court below, who was the lawful occupier of certain lands on the Crown farm Rooiboschvlakte, seized certain cattle, including thirty-nine head belonging to the Plaintiff, and placed them in a cattle kraal preparatory to taking them to the Pound. It is not definitely stated by any witness where the cattle were when seized by the Defendant but the only inference which, in the absence of any assertion by Plaintiff's witnesses to the contrary, can be drawn from the evidence is that the cattle were seized when grazing upon Defendant's lands which apparently had already been reaped. On ascertaining that his cattle had been seized by Defendant, Plaintiff went to the kraal in question and interviewed the Defendant. Defendant apparently adopted a most uncompromising attitude at this interview, telling the Plaintiff that he was prepared to release the cattle of other persons seized at the same time as Plaintiff's but that his (Plaintiff's) would be taken to the pound. Asked by the Plaintiff that before taking his cattle to the pound he should show him what damage had been done, the Defendant replied that he did not wish Plaintiff to pay him in grain or with a beast and that he did not want to have much to say to him. Defendant thereupon took Plaintiff's cattle out of the kraal and drove them to the pound accompanied by the Plaintiff. On their

arrival at the pound, the Poundmaster informed the Plaintiff that to release his cattle he would have to pay the sum of £4.10.3d. and as Plaintiff was unable to pay in cash three cattle were retained by the Poundmaster in lieu thereof.

Under cross-examination Plaintiff stated, inter alia: "I knew Defendant had impounded my cattle because they had been accused of damaging his property. I did not know that he had any crops. I told Defendant that my cattle had done no damage."

The question for decision then is whether the Plaintiff did discharge the onus which rested upon him of proving that the impounding of his stock under the circumstances indicated was in fact wrongful and unlawful.

Now section twenty-four of the Transvaal Pounds Ordinance, No. 7 of 1913, as amended, lays down that any owner (which is defined so as to include lawful occupier) of land shall be empowered to impound stock trespassing on his land at the time. Power to impound is conferred by the section for the act of trespass done quite irrespective of the question of damage which may have been occasioned thereby, special provision as regards damage being contained in section twenty-seven of the Ordinance.

It has already been pointed out that the Plaintiff failed to prove that his cattle were not trespassing in Defendant's land when seized and that the only inference which can be drawn from the evidence is that they were in fact so trespassing.

The Plaintiff, therefore, having failed to discharge the onus of proving that the original seizure was unlawful must, if he is to succeed, necessarily rely upon some other factor making their subsequent removal to the pound wrongful and unlawful. The only other provision upon which he could so rely is that contained in sub-section (1) of section thirty of the Pound Ordinance as amended by Ordinance No. 4 of 1932.

That sub-section as amended reads as follows:-

> "Whenever the owner of any stock liable to impoundment shall apply to the owner of land on whose property the said stock has been found trespassing for the release thereof before removal to the pound and shall tender to the said owner for trespass fees an amount being equal to one-half of the amount of the pound fees prescribed in section thirty-four plus the additional trespassing fees according to the scale prescribed in sub-section (4) of section twenty-seven: provided the amount so tendered be not in any case less than two shillings and sixpence and of any damages assessed as provided in section twenty-seven and claimed by the owner of the land the said owner shall on receipt of such moneys forthwith release the said stock."

In other words to make it obligatory upon the Defendant to release his stock before taking them to the pound it was incumbent upon the Plaintiff to tender to him, in addition to compensation for any damage which may have been occasioned, trespass fees amounting in the aggregate to £1.19.0.

There.....

There is no evidence whatsoever on the record as to any such tender having been made by the Plaintiff. He in his interview with the Defendant was apparently concerned with the question of damages alone and though maintaining that no damage had been occasioned by the trespass of his cattle was apparently prepared to compensate Defendant for such damage if it could be pointed out to him. In the absence of proof of a definite tender of trespass fees as laid down by the sub-section quoted above, it cannot be held that Plaintiff has established the fact that the action of the defendant, no matter how uncompromising and unaccommodating his attitude on the question of damages, in removing the cattle to the pound was wrongful and unlawful.

In the opinion of this Court, therefore, the Plaintiff in the Court below failed to prove that either the original seizure of the stock or their subsequent removal to the pound was wrongful and unlawful.

The Acting Assistant Native Commissioner accordingly erred in refusing on the application of Defendant's attorney at the conclusion of Plaintiff's case to enter a judgment of absolution from the instance.

The appeal must therefore be allowed with costs and the judgment of the Court below is altered to one of "Absolution from the instance with costs."

CASE NO. 23.

WILLIAM TEMBEKWAYO VS. LAZARUS MLIFE.

PRETORIA. 13th December, 1933. Before Howard Rogers, Esq., Acting President, Messrs. F.H. Ferreira and J.C. Yeats, Members of the Native Appeal Court (Transvaal and Natal Division).

Native law - Custody of illegitimate child - Varying customs.

An appeal from the Court of the Native Commissioner, Amersfoort.

THE FATHER OF AN ILLEGITIMATE CHILD BY AN UNMARRIED WOMAN BECOMES ENTITLED UNDER ZULU LAW TO THE CUSTODY OF SUCH CHILD ONLY IN THE EVENT OF A SUBSEQUENT CUSTOMARY UNION BETWEEN THE PARENTS.

The Appellant, as Plaintiff in the Court below, sued the Respondent, Defendant in the Court below, in an action wherein he claimed the custody of a certain male child born some twelve years ago as the result of Plaintiff's intercourse, out of wedlock, with one Nellie Mlife the daughter of Defendant.

It was common cause that there was no customary union or marriage between the Plaintiff and the girl Nellie subsequent to the birth of the child.

Plaintiff brought his action under Native custom alleging in his summons that he had paid the customary damages or fine to the Defendant in respect of the seduction of Nellie; that both before and after the seduction he was prepared to enter into a customary union with Nellie and had offered to pay lobolo to the Defendant for her; that his offer had on accasions been refused by the Defendant and that he was accordingly under Native law and custom entitled to the custody of the child.

The action was dealt with under Native law and custom by the Assistant Native Commissioner who entered judgment for the Defendant with costs. The Assistant Native Commissioner found, inter alia, that damages for the seduction had actually been paid to the Defendant by the Plaintiff and that there was no proof that Plaintiff ever offered to marry Defendant's daughter after he had seduced her nor of lobolo having been tendered. Further, in his reasons for judgment the Native Commissioner stated that under Native law and custom a father cannot claim his illegitimate child unless he marries the seduced girl and pays the lobolo demanded for her and that it is well established Native custom that illegitimate children pass to the father of the seduced girl.

Against the Native Commissioner's judgment an appeal was noted on the following grounds.-

1. That the Assistant Native Commissioner's finding on the facts that Plaintiff, the Appellant, never offered to marry Nellie, the daughter of the Defendant, now the Respondent, after he had seduced her, is against the weight of evidence.

2. That as it was established that Plaintiff, the Appellant, did offer to marry the aforesaid Nellie, both before and after she had been seduced by him, he is by Native Law and Custom entitled to the Custody of the Child claimed in the Summons.

The action was rightly dealt with according to Native custom and it is necessary for this Court before going into the question of fact raised in the notice of appeal, to decide, firstly, according to the customs of which particular tribe the issue must be determined and secondly, what the custom of that tribe is in reference to the point at issue.

The parties to the suit belong to different tribes the Plaintiff being a Swazi and the Defendant an Msutu. The Plaintiff resides in the Township of Bethal and the Defendant in the Amersfoort area of the District of Wakkerstroom. Any doubt which may exist as to the Native law to be applied is resolved by sub-section (2) of section eleven of the Native Administration Act which lays down that where different Native laws are in operation the Native law to be applied by the Court shall be that prevailing in the place of residence of the Defendant. It was stated in evidence by one of the Plaintiff's witnesses, Mboza Makuba, who resides and is apparently recognised as an Induna in the Amersfoort ward that Zulu custom prevails in that area and with this statement, which was uncontradicted, this Court sees no reason to disagree.

The issue therefore falls to be determined according to Zulu law and custom and it now becomes necessary to consider the second point referred to above, that is to say, what the Zulu custom is upon the point at issue.

In argument on behalf of the Appellant, Mr. Advocate Malan relied strongly upon certain Transkeian cases cited on pages 37, 38 and 39 of Whitfield's "South African Native Law" which clearly establish that according to the customs prevailing among certain tribes resident in those Territories the father of an illegitimate child by an unmarried woman is entitled to the ownership and custody of such child provided that he pays to the guardian of the woman the full fine claimable under Native Law for the pregnancy of such woman and a beast for the maintenance of the child born of such illicit intercourse.

This is the custom prevailing amongst certain tribes in the Transkeian Territories but it must be pointed out that Zulu law and custom have no application in those Territories and that it would seem from the remarks of the Basuto Assessors consulted by the Native Appeal Court in the case of "Mgunjana Lupindo vs. Sipambo (4 N.A.C. 51 - referred to on page 38 of Whitfield)"that the custom differs amongst various tribes resident in different parts of those Territories.

Mr. Malan also referred in argument to the Appellate Division Case: Mantjoze vs. Jaze (1914 A.D. page 145) which was determined according to Zulu custom. In that case the learned Chief Justice frankly admitted his ignorance of Native law saying that "as the members of the Court below were divided in opinion this Court must ascertain as best it can what the Plaintiff's rights are under Native law."

The learned Chief Justice then proceeded to quote as follows the evidence of two Chiefs who had testified as to the Native law in the case in question:-

"Qomintaba, a chief of the Kunalo tribe, said:

"The child belongs to the father of the girl. The actual father would have to lobola the mother. ..... The father cannot acquire any right in the child unless there is a subsequent marriage. It is not the custom to pay for the child only.

"Ntondolo, who was an Induna of the last witness, said:

"If a girl has a child before marriage it belongs to her father. In the old times there was a custom by which the father could buy the child ..... The custom is not that a child could be taken by force from its mother. When a man has put a girl in the family-way he may lobola the child if the woman won't come back to him and live with him.

"Gogo, Chief of the Mbata tribe, said:

"The father of the woman is entitled to his daughter's illegitimate child. The father of the illegitimate child would only get the child if he lobola'd the mother. There

used.....

used to be an old custom whereby the father could get the child if he made an agreement with the woman's father. I have never seen a custom where the child is bought and the mother left."

A further guide as to what is the Zulu law and custom upon the point at issue is to be found in the Natal Code of Native Law, bearing in mind the fact that the Zulus are the predominant tribe in Natal and that the Code, in so far as its provisions relating to pure Native law are concerned, was based on ascertained Zulu customary law.

Section thirty of the Natal Code of Native Law promulgated under Proclamation No. 158 of 1932 is as follows:-

"A child born of an unmarried Native woman becomes a member of the house of the mother of such woman and is subject to the kraal head. In the event of a subsequent customary union between the parents of such illegitimate child, it becomes a member of the house established by the union."

Sub-section (1) of section one hundred and thirty-seven of the Code provides for the payment of damages for the seduction of an unmarried female and it is significant that no provision whatever is made whereby on payment of the stipulated damages the father of an illegitimate child becomes entitled to the custody thereof.

This Court is accordingly unanimously of the opinion that the true Zulu law upon the point at issue is as was stated by the Chief Qomintaba in the case Mantjoze vs. Jaze previously referred to and as is set forth in section thirty of the Natal Code of Native Law. And indeed this entirely coincides with what the members of this Court have in their own experience found to be the custom amongst the majority of Native tribes in the Transvaal.

The Court finds, therefore, that the father of an illegitimate child by an unmarried woman becomes entitled under Zulu law to the custody of such child only in the event of a subsequent customary union between the parents.

As has already been pointed out, it is common cause in the present case that no customary union was entered into by the Plaintiff with Defendant's daughter Nellie and it follows that he is not entitled to custody of the child.

Under the circumstances it is unnecessary for the Court to go into the question of fact raised in the notice of appeal.

The appeal is dismissed with costs.